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No. 4079

1359

1359

United States

Circuit Court of Appeals

For the Ninth Circuit.

GETZ BROS. & CO. OF THE ORIENT, LIMITED,

Plaintiff in Error,

vs.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE COMPANY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States Court for China.

FILED

SEP 18 1923

F. D. MONKTON,

CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

GETZ BROS. & CO. OF THE ORIENT, LIM-
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In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO., OF THE ORIENT, LTD.,
Defendant.

Petition.

Plaintiff complains of defendant and for cause of action alleges:

1. That the plaintiff is a brokerage company duly registered at the American Consulate in Shanghai, and the defendant is an American Corporation doing business in the City of Shanghai, Republic of China.

2. That on or about the 3d day of February, 1922, defendant made and entered into a written contract with plaintiff, for the sale of 370 tons of Mild Steel Plate Cuttings, a copy of said contract is hereto attached and made a part hereof.

3. That plaintiff has duly performed all the conditions on his part to be performed and on the 3d day of February and ever since was ready and willing to receive and pay for, and duly offered to defendant to receive and pay for said Steel Plate Cuttings mentioned in said agreement.

4. Defendant did not then, or at any time, deliver said merchandise to plaintiff.

5. That said plaintiff because of said failure to deliver has been damaged in the sum of Taels 6.350.48.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Taels 6.350.48 interest and costs of suit.

Shanghai, March 27th, 1922.

F. J. SCHUHL,
Attorney for Plaintiff.

Filed at Shanghai, March 28, 1922. W. A. Chapman, Clerk. [1*]

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

H. M. Shirek, being duly sworn, deposes and says that he is the general manager and sole proprietor of the Merchandise Brokerage Company, the plaintiff herein; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to such matters therein stated on information and belief, and as to those matters he believes it to be true.

H. M. SHIREK.

Subscribed and sworn to before me this 28th day of March, 1922.

W. A. CHAPMAN,
Clerk of the United States Court for China. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

CONTRACT.

GETZ BROS. & CO., OF THE ORIENT LTD.

Shanghai, February 3d, 1922.

Getz Bros. & Co., of the Orient Ltd., have sold and Merchandise Brokerage have bought the following-described merchandise, upon the terms and conditions as named herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable.

Seller is not responsible for nondelivery by reason of loss of cargo en route, fire or any unavoidable casualties, or for delays beyond their control.

To be insured against war risk at buyer's expense.

TERMS—

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922.

Quantity	Description	Price U. S. Gold
370	Tons (More or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.	

Say Three hundred sixty to Three hundred seventy-one tons at Shanghai Taels 2.75 per picul of 133 $\frac{1}{3}$.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if

4 *Getz Bros. & Co. of the Orient, Limited*

Quantity	Description	Price U. S. Gold
	cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.	

Approved by seller,

GETZ BROS. & CO., OF THE ORIENT LTD.

(Signed) By T. L. PARKHURST,

Manager.

CONDITIONS.

If, after having been notified by the sellers of their readiness to deliver the goods, the buyers fail to take delivery of, and pay for, the same in accordance with this contract, they shall pay to the sellers, monthly thereafter, interest at the rate of 12% per annum on the contract price. The sellers shall nevertheless be at liberty in such an event, to require the buyers either to take immediate delivery of and to pay for the goods, or from time to time, to pay to the sellers a sum of money on account of the contract price in addition to the said interest at the rate of 12% thereon or on so much thereof as shall have been unpaid; and in the event of the buyers failing to comply with such requirements or of their failing to pay to the sellers any sum payable by them under this clause, the sellers may forthwith resell the goods either by public auction or private contract, and the buyers shall thereupon pay and make good to the sellers all loss (being the difference between the amount re-

alized from the sale of the goods and the contract price, with the said additional sum of 12% per annum on the contract price, or on so much thereof as shall have been unpaid) and all expenses thereby incurred by the sellers.

Sellers guarantee to insure the goods covered by this contract against loss by fire while remaining in the godowns of the steamship company bringing the cargo to Shanghai, for a period of not more than ten days after arrival. Insurance after that period is to be borne by buyers, and in event of loss by fire, buyers shall pay to the sellers the invoice value of said cargo together with such other expenses as may have been incurred by sellers for account of buyers in importation of said cargo.

The sellers may, if they consider it necessary or advisable to do so, insure against war risk for account of the buyers, but shall not be obliged to do so.

All duties and importing charges incurred by sellers in making importation into Shanghai shall be for account of buyers.

The sellers shall not be liable for delay in shipment of the goods or any portion of the goods, the subject of this contract, or for the nonfulfillment by them of this contract, or any portion thereof, in consequence of war, strikes, lock-outs, fire, flood, drought, accident, or any happening beyond the sellers control, nor in consequence of the anticipation by themselves or by others of any such event, whereby the manufacture, supply, shipment, transit or delivery of the goods or any portion thereof is prevented or delayed.

The sellers will not be responsible for loss or non-delivery due to commandeering of Cargo, Railways, Steamships, or withdrawal of same, or any other cause due to conditions of war. Commandeering of cargo by United States Government, or the taking over of a large portion of the output of a mill, cancels that portion of the contract on which material was commandeered by the Government or material unshipped from mill at time of Government interference.

All charges incurred for storing, interest, fire insurance, cartage, retrans-shipment, caused by Government embargo commandeering of railways or steamships, for the buyer's account.

The shipment shown on this contract is given only as an indication of the approximate that shipment is expected to move from factory and sellers assume no liability whatever for mill delays, or delays occasioned by shortage of steamship space, cancellation of steamer sailings, or any causes beyond their control.

Sellers reserve the right to make shipment either via Pacific Coast or Atlantic Coast at their option.

In the event of goods, or any portion thereof being lost in transit, or destroyed, before delivery, this contract shall be void, except as regards that portion of the goods (if any) which shall not have been destroyed.

The sellers will not be responsible for losses due to damage, leakage, evaporation or improper deliveries on part of wharf companies while goods are stored at wharf or in private godowns.

The buyers shall not be entitled to repudiate this contract, nor to claim compensation from the sellers, upon the ground that the goods have become rusted or damaged in transit, or have deteriorated in consequence of natural causes.

All shades of color, descriptions, dimensions, packing, quality, quantity, etc., are guaranteed approximately correct only, and usual trade margins of the country of production are allowed with regard to same.

In the event of there being more than one contract, for the purchase and sale of goods existing between the buyers and seller and in the event of buyers failing to carry out any of the terms of the contract, the sellers shall be entitled to refuse delivery to the buyers of any goods, or any portion [3] thereof, the subject of any other contract, until the buyers have complied with the terms of this contract.

No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai, nor shall any such claim be made after delivery has been taken, and the goods have been removed from the place of delivery, by the buyers.

The certificate of Lloyds, or of other competent examiners appointed for the purpose, as to the quality, quantity, description, dimension, shade of color, or otherwise, of the goods shall be final and conclusive as to all matters dealt with by such certificate.

Any tests with which it may be required that the goods must conform shall be made at the works of the manufacturers of such goods prior to the shipment thereof, and at no other place or time; and tests so made shall be final and binding on both parties to this contract.

Each partner in the Nong constituting the firm of the buyers shall be liable to the sellers for the due performance of this contract and every part thereof, as if such partner were the sole buyer and the sole proprietor of the business of such Hong.

Should any dispute arise between the buyers and sellers as to the quality or condition of the goods or otherwise in relation to this contract, which they are themselves unable to settle, the same shall be referred to the arbitration of three persons, two to be nominated by the American Consul-General of Shanghai and the third to be appointed by the two so nominated and the decision of any two of the arbitrators shall be binding both as regards the matter submitted to arbitration and so decided, and as regards the costs of arbitration.

CIF, CIF & C, and CIF C & I Contracts differ from FOB Contracts only in that Getz Bros. & Co. of the Orient Ltd. guarantee the cost of Insurance, Freight, or Insurance, Freight and Commission, or Insurance, Freight, Commission and Interest, as may be stipulated in the terms of purchase. No additional responsibility on Getz Bros. & Co. of the Orient Ltd. is involved.

C.I.F. Price includes manufacturers cost through

freight from factory to point of destination and marine insurance as stipulated in contract.

If the goods (or any part thereof) are not shipped from the United States within the time stipulated in this contract in consequence of *force majeure*, or any other causes beyond the control of the sellers, the buyers shall not be entitled to rescind this contract, nor to claim damages for breach thereof, but must take delivery when cargo arrives in Shanghai, irrespective of the period of delay.

In the event of the goods, or any portion thereof, ordered under this contract, being delayed in shipment by reason of embargoes imposed by the Government of United States of America, or owing to any other causes beyond the sellers' control, due to United States of America being in a state of war, the sellers shall not be liable for delay in delivery. Should such embargo be subsequently removed and the said goods or any portion thereof subsequently arrive the buyers shall be bound to accept under the terms of this contract, the said goods or such portion or portions thereof as shall so arrive.

It is further understood and agreed that if any one order placed by buyer with the seller is not delivered owing to causes beyond sellers' control, the buyer hereby agrees that such nondelivery is not to nullify his contracts with the seller for other materials nor is such nondelivery to be accepted by buyer as a justification or reason for attempting cancellation of such other contracts.

It is also understood that the sellers' obligation to fulfill the terms of this contract is subject to the United States Government issuing an Export License covering material specified in this contract.

Force majeure to free Getz Bros. & Co. of the Orient Ltd. from all responsibility in connection with this contract. [4]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Demurrer.

Now comes the above-named defendant, through its attorneys, Fleming, Davies & Bryan, and demurs to plaintiff's petition filed herein, on the ground that said petition does not state facts sufficient to constitute a cause of action.

(Sgd.) FLEMING, DAVIES & BRYAN,
Attorneys for Defendant.

Demurrer. Filed at Shanghai, April 10, 1922.
(Sgd.) W. A. Chapman, Clerk. [5]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Bill of Exceptions. Filed at Shanghai, China,
this 7th day of July, 1923. —————, Clerk.

Bill of Exceptions.

BE IT REMEMBERED that on the 16th day of April, 1923, the above-entitled action came on for hearing upon plaintiff's petition and defendant's demurrer to plaintiff's petition before the Honorable Charles S. Lobingier, Judge of the United States Court for China, the plaintiff appearing by Messrs. Schuhl & Schoenfeld in the person of F. J. Schuhl, Esq., and the defendant appearing by Messrs. Davies & Bryan in the person of J. B. Davies, Esq., and the following proceedings took place.

Thereafter on the 19th day of April, 1923, the Honorable Charles S. Lobingier, Judge of the United States Court for China, filed with the Clerk of said Court an order overruling defendant's demurrer. Said order is as follows: [6]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Order Overruling Demurrer.

SYLLABUS.

(By the COURT.)

1. SALES.—Conditions.—A sale of merchandise with an undertaking for “complete delivery” by a certain date “from Shanghai stock” is not rendered conditional by a further clause requiring delivery of shipping documents “on payment, if cable advice from home office permits.”

2. ID.—ID.—Haieh Po-Hsiang vs. Shippers’ Commercial Corp., I Extrater., 1010, distinguished. Messrs. DAVIES & BRYAN, by Mr. Davies, for demurrant.

Messrs. SCHUHL & SCHOENFELD, by Mr. Schuhl, *contra*.

LOBINGIER, J.—Defendant demurs to a complaint alleging nonperformance of a contract whose material provisions follow:

“GETZ BROS. & CO., OF THE ORIENT, LTD., *have sold* and Merchandise Brokerage *have bought* the following-described merchandise, upon the terms and conditions as named

herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable. * * *

Shipment: Delivery from Shanghai Stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1923. * * *

Receipt of deposit Tails 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be received approximately seven (7) days when written confirmation will be made."

It is the last paragraph which affords the basis of the demurrer, defendant's counsel contending that it brings the case within one¹ where sale was "subject to * * acceptance at Seattle office." But this contract, it will be seen, does not contain that provision. It is true that defendant agrees "to deliver documents on payment, if cable advice from home office permits," etc. But the documents (which appear to mean shipping papers) do not seem important in this transaction. "Delivery" is to be made "from Shanghai stock," so that shipping documents would seem unnecessary. At any rate it is not the documents but the goods which are the subject matter of the sale and of the latter "complete delivery and full payment" were "to be

¹ *Haieh Po-Hsiang vs. Shippers' Commercial Corp., I Extrater., 1010. [8]*

made on or before February 28, 1922." This undertaking was not "subject to acceptance by the home office" and the fact that another, and minor, feature may have been, would not prevent enforcement of the former.

The complaint, having alleged performance on plaintiff's part and nondelivery, seems, therefore, to state a cause of action and the demurrer is, accordingly, overruled. Defendant is allowed ten days to answer.

By the Court,

CHARLES S. LOBINGIER,

Judge.

Order. Filed April 19, 1923. W. A. Chapman,
Clerk. [7]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Exception to Order Overruling Demurrer.

Now comes the above-named defendant, through Davies & Bryan, its counsel, and excepts to the

order of this Court made on April 19, 1923, overruling demurrer to plaintiff's petition filed by it.

Dated Shanghai, April 20, 1923.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

Exception. Filed at Shanghai, China, this 21st day of April, 1923. W. A. Chapman, Clerk. [9]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Answer.

Copy to Schuhl & Schoenfeld, April 26, 1923.

Now comes the above-named defendant and answering plaintiff's petition filed herein shows unto this Honorable Court as follows:

1. Answering paragraph one of said petition defendant admits that it is an American Corporation carrying on business at Shanghai, China, but has no knowledge as to the other matters therein alleged, and therefore denies the same.

2. Answering paragraph two of said petition, defendant admits executing the document therein mentioned, a copy of which is attached to said petition, but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant's home office as provided for in said document.

3. Answering paragraph three of said petition, defendant has no knowledge of the matters therein alleged, and therefore denies the same.

4. Defendant admits paragraph four of said petition.

5. Defendant denies each and every allegation contained in paragraph five of said petition.

6. Further answering said petition, and by way of a further and separate defense, defendant alleges that if any contract existed between the parties hereto, as alleged by plaintiff [10] in this petition, that the same has been canceled by mutual consent of the parties hereto.

WHEREFORE, defendant prays this Honorable Court for an order dismissing plaintiff's said petition, without cost to the defendant.

GETZ BROS. & CO. OF THE ORIENT, LTD.

(Sgd.) By T. L. PARKHURST,

Manager.

United States of America,
Extraterritorial Jurisdiction in China,
Consular District of Shanghai,—ss.

T. L. PARKHURST, being duly sworn, deposes and says that he is the general manager in Shang-

hai of the above-named defendant, and signed the above answer as such; that he has read said answer, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Sgd.) T. L. PARKHURST.

Subscribed and sworn to before me this 26th day of April, 1923.

(Sgd.) R. T. PEYTON-GRIFFIN,

Deputy Clerk United States Court for China.

Answer. Filed at Shanghai, China, this 26th day of April, 1923. (Sgd.) R. T. Peyton Griffin, Deputy Clerk. [11]

Exception to Order Overruling Demurrer.

Thereafter on the 21st day of April, 1923, the defendant through its attorneys, Messrs. Davies & Bryan, filed with the Clerk of said court a formal written exception excepting to the said order overruling defendant's demurrer, which said defendant hereby designates as its

EXCEPTION No. 1.

That thereafter on Tuesday, the 12th of June, 1923, the above-entitled action came on regularly for trial before the Honorable Charles S. Lobingier, Judge of the United States Court for China, the plaintiff appearing by Messrs. Schuhl & Schoenfeld in the person of F. J. Schuhl, Esq., and the defendant appearing by Messrs. Davies & Bryan in the person

of R. T. Bryan, Jr., Esq. Thereupon the following witnesses were called and examined after being duly sworn: [12]

Testimony of H. M. Shirek, in His Own Behalf.

Witness—H. M. SHIREK.

(Questions by Mr. F. J. SCHUHL.)

Q. State your name please?

A. Henry Shirek.

Q. What connection have you with the Merchandise Brokerage Co.? A. Sole proprietor.

Q. Where are your offices located?

A. No. 9 Extra Road.

Q. How long have you resided in Shanghai?

A. 3½ years.

Q. What is your nationality? A. American.

Q. Did you ever have any transaction with the defendant company?

A. I entered into a contract with them for the purchase of plate cuttings.

Q. That is the contract attached to the petition.

A. Yes.

A. I will ask you if you deposited Tls. 900 as bargain money under that contract? A. I did.

Q. And whether or not this cargo as stated in the contract was delivered to you? A. No.

Q. Was the Tls. 900 returned to you? A. Yes.

Q. When was it returned?

A. On or about February 14, 1922.

Q. What did you do when you received the check?

A. I kept it on hand for several months.

(Testimony of H. M. Shirek.)

Q. Did you have any conversation with Mr. Parkhurst with reference to this, with reference to delivery? [13] A. Yes.

Q. When was the first discussion, what date?

A. It was about the 12th or 13th.

Q. Of February? A. Yes, 1922.

Q. What was stated by him on that date?

A. Mr. Parkhurst stated he had received a cable from his home office which advised him to proceed legally against the original purchasers of the cargo.

Q. Did he proceed legally against the original purchasers of the cargo? A. He did not.

Q. Was the cargo eventually sold to the original purchasers?

A. No, he sold it to a different party.

Q. Tell the Court the conversation you had with Mr. Parkhurst before signing the contract?

Objection: conversation leading up to the contract was not admissible: the contract speaks for itself.

Mr. SCHUHL.—It is necessary to explain an ambiguity.

The COURT.—What do you want to prove?

Mr. SCHUHL.—The conversation was this. If the home office advised Mr. Parkhurst that he would have to sue the original purchasers of the cargo, Mr. Shirek would not be able to have the cargo.

Q. Did he show you the cable?

A. No, he would not. He was not willing to do so.

(Testimony of H. M. Shirek.)

Q. Who eventually got this cargo? Do you know?

Objection: nothing to do with this case. Immaterial, incompetent and irrelevant.

The COURT.—What is the purpose of the question?

Mr. SCHUHL.—To show the original buyers did not get the cargo.

The COURT.—It might be material who the original buyers were.

Q. Who were the original buyers?

A. There were several in number. I could not remember who the original buyers were, all of them. There were possibly five or six. [14]

Q. Do you know whether they received the cargo?

A. The original purchasers?

Q. Yes?

A. No, they refused to take delivery on the plea that the cargo was not up to specifications, or something rather wrong with it.

Q. The original buyers refused to take delivery?

A. They did.

Q. Later on, after this contract was signed, on or about February 20, did you receive a letter through me from Messrs. Getz Bros. offering delivery of part of the cargo? A. Yes, I recall.

Q. I will show you Plaintiff's Exhibit "A" and ask you if that is the letter you received from me?

A. Yes.

Plaintiff's Exhibit "A" offered in evidence.

Objection: Irrelevant, immaterial and incompe-

(Testimony of H. M. Shirek.)

tent, tending to prove nothing in the case. The letter on the face of it appears to be another offer for the sale of fifty tons of plate cutting.

Mr. SCHUHL.—Plaintiff's Exhibit "B" is a letter which I wrote to Getz Bros. on February 16, which is admitted by Mr. Bryan, and Exhibit "A" is a letter in reply.

Plaintiff's Exhibit "B" offered in evidence.

Objection: irrelevant, immaterial and incompetent and tending to prove or disprove no issues in the case.

The COURT.—I think the whole correspondence might enlighten the Court on the situation. This seems to refer to another letter on the 14th. Have you got that?

Mr. SCHUHL.—Yes.

The COURT.—I think the whole correspondence would be helpful.

Q. The cargo mentioned in Exhibit "A" of which they state they are holding fifty tons which they would allow you to take up. Is that part of the original cargo? A. Yes.

Q. Part of the cargo mentioned in the contract?
A. Yes.

Q. You are positive of that? A. Yes. [15]

Exhibit "C" offered in evidence.

Q. The price that you were to pay for the cargo was Tls. 2.75 per picul? A. Yes.

Q. Do you know what the market price was about February 28, 1922?

(Testimony of H. M. Shirek.)

A. It was approximately Tls. 1.00 higher than the price at which I purchased it under the contract.

Q. It had advanced one tael? A. Yes.

Motion to strike out all Exhibits offered in evidence unless plaintiff offered the letter of February 14.

Mr. SCHUHL.—I am going to do that.

The COURT.—Why not do it now?

Mr. SCHUHL.—I will.

Q. Showing you Exhibit “D” I will ask you whether you received that letter? A. Yes.

Q. What did you do upon receipt of that letter?

A. I objected to it.

Q. In what form?

A. Verbally, and I made enquiries.

Q. Did you talk with Mr. Parkhurst about it?

A. Yes.

Q. What did you tell him?

A. I asked to be shown the cable which said, if they received it, they were to pursue legal proceedings against the original purchasers.

Q. Did they show you the cable? A. No.

Q. They did not take legal proceedings?

A. They did not.

Q. What loss did you suffer through the failure of the defendants to live up to the contract? [16]

A. Tls. 6,000.00.

Q. How did you suffer such a loss?

A. The purchase price under the contract was Tls. 2.75 per picul. There was approximately six thousand piculs and the market price was approxi-

(Testimony of H. M. Shirek.)

mately Tls. 1.00 higher and I could have sold for Tls. 3.75.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. The last clause on the first page of the contract says "Reply should be received approximately seven days when written confirmation will be made." Was any written confirmation ever made?

A. In what form?

Q. Was any written confirmation ever made to that contract?

A. No written confirmation. The only written reply, I might say, to that contract, was written on February 14.

Q. No written confirmation was made and the first reply you received was on February 14, which repudiated the contract?

A. Well it did, but it did not follow the terms of the contract.

Q. It repudiated the contract, did it not?

A. I don't believe so.

Q. You don't believe so? A. No.

Q. It did not confirm it?

A. On the face of it it would appear to repudiate the contract.

Q. It did repudiate it?

A. Well, not so far as I was concerned.

Q. As far as the defendants were concerned it repudiated the contract in the letter of February 14. Isn't that true?

(Testimony of H. M. Shirek.)

A. It was their desire to repudiate the contract, perhaps.

Q. And they informed you in this letter they had received a reply from their home office, February 7?

A. You have admitted the letter of February 7.
[17]

Q. In that letter was the check for Tls. 900?

A. Yes.

Q. Deposit money under the contract?

A. Deposit money I had put up.

Q. And you received it back? A. I did.

Q. Handing you Defendant's Exhibit 1, is this the check which you received from the defendants?

A. I believe so.

Q. And it is endorsed on the back by you?

A. Yes.

Q. And it is marked "cancelled" showing you received the money? A. Yes.

Defendant's Exhibit 1 offered in evidence.

Received without objection.

Q. Did you know these goods were in Shanghai?

A. The goods named in the contract?

Q. Yes. A. Yes.

Q. How did you know it?

A. I had inspected them.

Q. Did you make a claim within seven days after signing this contract?

A. I don't know I would consider it a claim. I put the matter in the hands of Mr. Schuhl as soon

(Testimony of H. M. Shirek.)

as I found Getz Bros. had not proceeded legally and would not deliver the cargo to me.

Q. Had not proceeded legally in your opinion?

A. That is a question—

Q. You made no claim before February 20. Isn't that so?

A. The goods were not en route from the United States or Europe. It was stock cargo.

Q. You made no claim before February 20? Answer my question, please? [18]

A. What form of claim?

Q. In writing. Did you or did you not make any claim on defendants before February 20?

A. There was no claim to be made.

Q. Did you, or did you not make any claim?

A. No.

Q. At the time you signed the contract on February 7, you knew the goods had arrived in Shanghai?

A. The cargo was already in Shanghai prior to that date.

Q. You knew it was in Shanghai at the time the contract was signed? A. Yes.

Q. You are quite sure, are you, that the defendants did not confirm this contract in writing? You are quite sure about that?

A. The only letter I received from them—the first letter—was dated February 14.

Q. They do not confirm the contract?

A. In that letter?

Q. In that letter.

(Testimony of H. M. Shirek.)

A. Well, I think they do not in that letter.

Q. Nor in any subsequent letter?

A. Well, there was the letter following that letter of February 14 which offered me fifty tons, whether that can be construed as such.

Q. That does not confirm your contract for 375 tons? A. No.

Q. There was no letter which confirmed the contract was there?

A. No, there was no letter which confirmed the contract.

Q. Were these plate cuttings cut up in strips or were they in big pieces?

A. Irregular sizes.

Q. Not cut up in strips?

A. Some were triangular pieces. [19] Some were strips, some were shearings and some were irregular sizes.

Q. You know it is customary for local dealers to cut them up into long strips, eighteen inches long, four to six inches wide, and to tie them up in bundles. You know that?

A. Do I know whether that is customary?

Q. Yes?

A. It just depends upon the purpose to which they put them.

Q. Plate cuttings in strips and bundles are more expensive than those which come in irregular shapes and sizes?

A. They were not tied up in bundles, some were shearings and some triangular pieces.

(Testimony of H. M. Shirek.)

Q. Will you answer my question?

A. They are more expensive?

Q. Yes? A. I don't know.

Q. You don't know whether they are or are not?

A. No.

Q. And yet you have testified as to market conditions?

A. I know this, that regular shapes in plate cuttings are a whole lot more valuable, whether they are tied up in bundles or how they are packed does not make much difference. Maybe they would be a little more convenient to handle.

Q. Do you know that plate cuttings in February could be purchased from abroad from Tls. 2.20 to Tls. 2.60 per picul?

A. Well, there are different kinds of plate cuttings. I don't recall what the indent price for plate cuttings was just about that time.

Q. You don't know the indent price at that time?

A. I don't recall.

Q. Then how can you recollect the market price?

A. Because that had a direct bearing upon my profit and loss. [20]

Q. The only thing you lost was the difference between the contract price and the market price?

A. What I lost was the difference between the contract price and what I could have sold it for.

Q. You did not lose your deposit?

A. I received that back.

(Testimony of H. M. Shirek.)

Redirect.

(Questions by Mr. SCHUHL.)

Q. The first letter you received from Getz. Bros. was much more than seven days after the signing of the contract? A. It was dated February 14.

Q. Had you any conversation with Mr. Parkhurst before the fourteenth?

A. Yes, I think about the 12th or 13th.

Q. Relate the conversation?

A. It was with respect to whether they could carry out the contract or not and Mr. Parkhurst said he had already received a cable from the office in San Francisco and they advised they should proceed legally against the original purchasers.

Q. Did he say he was going to proceed legally?

A. Yes.

Q. Had you any conversation before that with him?

A. Well, if I recollect properly I think I telephoned to him on or about the time the contract was to be confirmed to find out whether he had received any advice. At that time I don't believe he had received advice from his home office—not until a later date.

Q. Did you make any inquiries as to the market price?

A. After February 3, yes. I followed the market quite closely and there was a tendency towards an increase. The price was steadily advancing. I should not say "steadily" but fluctuating to a higher level. [21]

Testimony of Sung Yu Ching, for Plaintiff.

Witness SUNG YU CHING.

(Questions by Mr. SCHUHL.)

Q. State your full name? A. Sung Yu Ching.

Q. Age is what? A. 53.

Q. What is your occupation?

A. Iron merchant.

Q. Are you connected with the Chinese iron guild? A. Yes.

Q. What is your connection with that guild?

A. Chairman.

Q. What is the guild composed of?

A. Every month they are combined and talk over the market prices, some months every week.

Q. How long have you been chairman of the guild? A. Over ten years.

Q. Ask him if he knows whether during the month of February the market was steady or moving up or down in price on steel plate cuttings.

A. On February to March the price was Tls. 3.70 to Tls. 3.80 per picul.

Q. What day in February was the market price Tls. 3.70 to Tls. 3.80.

A. About February 15.

Q. What was it the last day of February, Number 28 day? A. About the same.

Q. About the same price? A. Yes.

Cross-examination.

(Questions by Mr. BRYAN.)

Q. What was the price in February, did you say?

(Testimony of Sung Yu Ching.)

A. Tls. 3.70 to Tls. 3.80.

Q. What was the price in February in the beginning—how much? A. Same, same. [22]

Q. What class of plate cuttings?

A. (Answer not interpreted.)

Testimony of Zee Chang Yung, for Plaintiff.

Witness ZEE CHANG YUNG.

(Questions by Mr. SCHUHL.)

Q. State your name? A. Zee Chang Yung.

Q. How long have you lived in Shanghai?

A. 25 years.

Q. What is your occupation, what business are you in? A. Iron merchant.

Q. Are you connected in any way with the iron merchant's guild?

A. I am a member of the iron merchant's guild.

Q. How long have you been in the iron business in Shanghai?

A. Since I came out for business up to to-day.

Q. How many years? A. Twenty-five years.

Q. Are you acquainted with the market prices of mild steel plate cuttings? A. On what date?

Q. Between February 3 and 28, 1922?

A. At that time you can sell at Tls. 3.75.

Objection to interpretation by Mr. Bryan.

Mr. BRYAN.—Q. Ask him what the market price was in February, 1922? A. Tls. 3.75.

Mr. SCHUHL.—Q. The last day of February, what was the market price? A. Nearly that.

(Testimony of Zee Chang Yung.)

Cross-examination.

(Questions by Mr. BRYAN.)

Q. A little while ago you said the price was Tls. 3.00 to Tls. 3.08, didn't you?

A. I said three seven or three eight.

Q. Ask him if he said Tls. 3.00 or Tls. 3.08?

A. No. [23]

Q. When you said Tls. 3.07 or Tls. 3.08 you meant mace, didn't you?

A. I meant Tls. 3.70 to Tls. 3.80, not Tls. 3.07 to Tls. 3.08.

Objection. (Mr. BRYAN.) I would like to put it on record that I don't agree with the interpretation of the interpreter.

Offer by Mr. Schuhl to get another interpreter.

Mr. BRYAN.—I don't think it is material, if the Court pleases.

The COURT.—Very well, let that appear on the record, too.

Plaintiff rests.

Motion by defendant for judgment of nonsuit. (Typewritten motion handed in.)

The COURT.—Ruling on motion reserved.

Mr. BRYAN.—Exception reserved in case motion is overruled (which said defendant hereby designates as its exception No. 2).

Testimony of P. Y. Angus, for Defendant.

Witness P. Y. ANGUS.

(Questions by Mr. BRYAN.)

Q. State your name please?

A. Percy Yoshida Angus.

Q. Nationality?

A. British.

Q. How old are you?

A. 42.

Q. Married or single?

A. Married.

Q. What is your occupation?

A. Marine and cargo surveyor.

Q. How long have you been a marine and cargo surveyor?

A. About seven years.

Q. Will you please state your qualifications as marine and cargo surveyor?

A. Twenty-two years of sea experience, on ships, and two years apprenticeship as surveyor, several years experience with another local firm and for the last three years principal of my own firm.

Q. Are you familiar with the market price of plate cuttings in Shanghai? [24]

A. To some extent.

Q. To what extent?

A. Great quantities of this class of cargo go through my hands in the course of a year, various shipments, and we keep in touch with the market and we have facilities of being able to ascertain market values.

(Testimony of P. Y. Angus.)

Q. Do you know what the price of mild steel cuttings were in the month of February, 1922?

A. About the middle of the month, from records on the market, they ranged about Tls. 2.20 to Tls. 2.30. That was on order cargo. That was what cargo could be ordered for. That was on the American and European markets for mild steel cuttings.

Q. What was the market price for mild steel plate cuttings in Shanghai in February, 1922?

A. About Tls. 3.00 to Tls. 3.10.

Q. What part of the month?

A. About the middle of the month.

Q. About what was the price of mild steel plate cuttings about the 28th of February?

A. There was practically no alteration during the month, with a slight downward tendency in March.

Q. Did the market price rise between February 3d and the middle of the month?

A. Not in general. It may in certain contracts, but in general on the market it did not.

Q. These mild steel plate cuttings. What was the class of plate cuttings—first class, second class or third class?

A. Mild steel plate cuttings don't go in classes as a general rule but as shearings or cuttings from plates, irregular shapes, pieces which come from plates used in shipbuilding, or bridge build-

(Testimony of P. Y. Angus.)

ing, irregular pieces—triangular or rectangular pieces which are cut off. [25]

Q. Is it not a fact that Chinese cut these mild steel plate cuttings into strips about eighteen inches long—four to six inches wide and tie them up in bundles?

A. That is done.

Q. About what does it cost a picul to cut them in strips and put in bundles?

A. I am afraid I could not give you that answer. The cost for cutting just depends. Some of the local iron merchants have their own cutting machines, others cut by hand.

Q. Would you or would you not say that twenty tael cents per picul would be a fair estimate of what it would cost to cut.

Objection: leading question. Sustained.

Cross-examination.

(Questions by Mr. SCHUHL.)

Q. The twenty-two years of sea experience would not give you much knowledge of the price of mild steel cuttings?

A. The question I was asked was what led up to my being a surveyor.

Q. During the twenty-two years of sea experience you did not have much occasion to survey or note the price of mild steel plate cuttings?

A. That was leading up to my becoming a surveyor.

Q. During the month of February, 1922, how

(Testimony of P. Y. Angus.)

many surveys did you make of mild steel plate cuttings?

A. That I could not tell you.

Q. Did you make any?

A. I could not say.

Q. How are you able to fix in your mind what the market price was?

A. By enquiries upon the market.

Q. When did you make these enquiries? [26]

A. Yesterday.

Q. You made them yesterday?

A. Yes.

Q. Where did you make them?

A. On the market.

Q. What market?

A. The local market.

Q. Where?

A. From various importers.

Q. What importers did you enquire from?

A. People that it would be part of my business to know.

Q. What are the names of some of these importers from whom you enquired the price of these steel cuttings?

A. Must that question be answered?

The COURT.—I think so. You base your testimony on enquiries made from firms doing this kind of business. You asked them how much it was worth in February?

A. Yes. I have certain people whom I can ask from.

(Testimony of P. Y. Angus.)

Q. You are reporting what they told you as to the price in February?

A. Yes.

Application: The witness' evidence be stricken out on the ground that it is hearsay.

The COURT.—I am inclined to think the objection is good if the witness has no personal knowledge and is relying upon statements made by dealers. The way to prove this would be to call the dealers.

WITNESS.—I have my own records and I checked them up with various dealers.

Mr. SCHUHL.—Well, give us their names?

A. Messrs. P. Heath & Co. was one.

Q. They told you what the market price was in February?

A. Yes.

Mr. SCHUHL.—Objection: Application to strike out testimony on the ground of hearsay.

The COURT.—Sustained. To which ruling of the Court the defendant then and there excepted as follows:

Mr. BRYAN.—Exception reserved; which said defendant hereby designates as its

EXCEPTION No. 3.

Testimony of C. Reeves, for Defendant.

Witness C. REEVES:

(Questions by Mr. BRYAN.)

Q. What is your name? [27]

A. Christopher Reeves.

(Testimony of C. Reeves.)

Q. Nationality?

A. British.

Q. How old are you?

A. 40.

Q. Where do you live?

A. Shanghai.

Q. What is your business?

A. Marine and cargo surveyor.

Q. How long have you been a marine and cargo surveyor?

A. About nine years.

Q. Please state your qualifications as marine and cargo surveyor.

A. British Board of Trade extra master's certificate and nine years' experience, which is the most important thing.

Q. Are you familiar with the local market for mild steel plate cuttings?

A. Yes.

Q. Upon what do you base your familiarity with the market?

A. Surveying hundreds of tons of it as it comes in, under disputes or not under disputes as the case may be.

Q. Do you know what the market price was in February, 1922?

A. I would have to go to—

The COURT.—The question is "Do you know?"

A. Not personally.

Mr. BRYAN.—Q. What do you mean "Not personally"?

(Testimony of C. Reeves.)

A. I do not buy or sell cuttings. As a cargo surveyor I very very often find it necessary to put into my reports for underwriters actual market values. To find them it is necessary for me to call upon firms of repute, well known firms. That is how I acquire my knowledge.

Q. You call upon people and ask what the value of the cargo would be? [28]

A. I call upon reputable people and they, if I may say so, give me much more valuable information than anybody else, because it is to be personally and I do not divulge who gives it to me.

Q. You do not go beyond that?

A. I never deal in it myself.

Q. Did you in February, 1922, at any time during the month make any enquiries as to the market price?

A. I don't remember, that is a year and a half ago.

Q. What was the market price of mild steel plate cuttings from enquiries which you made yesterday?

Mr. SCHUHL.—Objection: Hearsay.

The COURT.—Sustained. To which ruling of the Court the defendant then and there excepted as follows:

Mr. BRYAN.—Exception reserved; which said defendant hereby designates as its

EXCEPTION No. 4.

Mr. BRYAN.—At this time, your Honor, I wish to renew my motion to dismiss the plaintiff's

petition, which I made at the conclusion of the plaintiff's case.

The COURT.—It is not necessary to renew it, for it has not yet been ruled upon.

Mr. BRYAN.—Then I wish to move at this time that the Court excludes from its consideration all the evidence introduced by plaintiff and give judgment for the defendant notwithstanding the evidence. [29]

COPY.

Head office

San Francisco, U. S. A.

Plaintiff's Exhibit "A."

GETZ BROS. & CO. OF THE ORIENT, LTD.

Incorporated.

Exporters

and

Importers.

Whiteaway, Laidlaw Bldg.,

Nanking Road Cor. Szechuen.

Shanghai, China, February 20th, 1922.

Mr. F. J. Schuhl,

112 Szechuen Road,

Shanghai.

Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately

40 *Getz Bros. & Co. of the Orient, Limited*

fifty (50) tons of Plate Cuttings that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept this offer.

Yours truly,

GETZ BROS. & CO. OF THE ORIENT, LTD.

By T. L. Parkhurst,
Manager.

TLP-RA

Cause No. 1676 Exhibit "A" U. S. Court for China. [30]

COPY.

Plaintiff's Exhibit "B."

February 16th, — 2.

Messrs. Getz Bros. & Co.,
Shanghai, China.

Dear Sirs:

Your letter of the 14th instant addressed to the Merchandise Brokerage Co. has been turned over to the writer for reply. I would like to have a definite answer from you as to whether or not you intend to deliver to my client 370 tons of steel plate cuttings under the terms of your contract dated February 3d. My client feels that they are entitled to the delivery of this plate.

Yours very truly,

Cause No. 1676 Exhibit "B" U. S. Court for China. [31]

COPY.

Plaintiff's Exhibit "C."

February 21st, — 2.

Messrs. Getz Bros. & Co. of the Orient, Ltd.,
Shanghai, China.

Dear Sirs:

Re: Merchandise Brokerage Co.

I have your kind favor of the 20th instant and beg to say that my clients are willing to accept the fifty tons of plate cuttings mentioned in your letter providing however you agree to deliver the balance of the cargo under the contract within 48 hours. My client feels that they are entitled to the entire lot 370 tons and unless the cargo is delivered, I will be compelled to institute proceedings for damages.

Yours very truly,

Cause No. 1676 Exhibit "C" U. S. Court for
China. [32]

COPY.

Plaintiff's Exhibit "D."

GETZ BROS. & CO. OF THE ORIENT, LTD.

Incorporated.

Exporters

and

Importers.

Whiteaway, Laidlaw Bldg.,

Nanking Road Cor. Szechuen.

Shanghai, China, February 14th, 1922.

The Merchandise Brokerage Co.,

No. 7 Ezra Road,

Shanghai.

Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS.

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

“Re Plate Cuttings stock—We understand legally must sue buyers before selling.”

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

GETZ BROS. & CO. OF THE ORIENT, LTD.

By T. L. Parkhurst,
Manager.

TLP/RA

enclos: cheque.

Cause No. 1676 Exhibit "D" U. S. Court for
China. [33]

(Defendant's Exhibit No. 1.)

No. 705

Shanghai, February 14, 1922.

November 17, 1922.

O. K.—T. L. P.

ASIA BANKING CORPORATION,
SHANGHAI BRANCH.

Pay Merchandise Brokerage Co., or order Shanghai Taels Nine Hundred only.

GETZ BROS. & CO. OF THE ORIENT, LTD.

p. p.

By T. L. Parkhurst,
Manager.

Sh. Tls. 900.00.

[Endorsement on back of check]: MERCHANDISE BROKERAGE COMPANY. (Sgd.) By H. M. Shirek, Manager. [34]

In the United States Court for China.

Certificate of Reporter.

I, Ralph Thomas Peyton-Griffin, Official Reporter of the United States Court for China, do hereby certify that the above and foregoing transcript, pages 13 to 29, inclusive, and Exhibits "A" to "D," inclusive, and No. 1, pages 30 to 34, inclusive, contains all the testimony offered by either party at the trial of the above-entitled cause together with objections of counsel and rulings thereon by the Court.

R. T. PEYTON-GRIFFIN,
Official Reporter. [35]

After plaintiff had rested, as appears on page 24 of the foregoing transcript, defendant's counsel handed to the reporter, Judge and opposing counsel, but did not offer as an exhibit nor file with the Clerk, the following two typewritten manuscript pages, which he had prepared in advance: [36]

Mr. BRYAN.—If your Honor pleases, defendant moves that plaintiff's petition be dismissed and that the Court find for the defendant, notwithstanding the evidence, upon the following grounds:

1. Because plaintiff has not proved facts sufficient to constitute a cause of action.

2. Because the evidence does not sufficiently and satisfactorily establish that the plaintiff and the defendant ever entered into any contract on the 3d day of February, 1922, whereby the defendant

agreed to sell to the plaintiff and the plaintiff to purchase from the defendant three hundred and seventy (370) tons of Mild Steel Plate Cuttings.

3. Because the evidence sufficiently and satisfactorily establishes that the contract, if any, a copy of which is attached to the plaintiff's petition, contains the following clause:

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advices from our home office promise sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

4. Because the evidence sufficiently and satisfactorily establishes that on the 14th day of February, 1922, the defendant wrote the plaintiff the following letter:

“February 14th, 1922.

The Merchandise Brokerage Company,
No. 7 Ezra Road,
Shanghai.

Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS.

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

‘Re Plate Cuttings stock—We understand legally must sue buyers before selling.’

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer

to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the liability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our cheque No. 705 for [37] Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

RLP/RA

enclos: cheque."

5. Because the evidence sufficiently and satisfactorily establishes that the defendant received the check for Taels Nine Hundred (T900.00) made out to said plaintiff and signed by said defendant, which said check was enclosed in said letter dated February 14, 1922, being the return of deposit referred to in said contract, if any, attached to plaintiff's petition, and that plaintiff cashed said check for Taels Nine Hundred (T900.00).

6. Because the evidence sufficiently and satisfactorily establishes that no written confirmation of said contract, if any, was ever made.

7. Because said contract, if any, attached to plaintiff's petition provides:

"No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after buyers have been notified of the arrival of the goods in Shanghai * * * ."

8. Because the evidence sufficiently and satisfactorily establishes that plaintiff was notified at the time of the signing of said contract, if any, that said three hundred and seventy (370) tons of Mild Steel Plate Cuttings had arrived in Shanghai, and that said plaintiff, although he had been notified that said goods had arrived in Shanghai, made no claim within seven days thereafter in accordance with the provisions of said contract, if any.

9. Because plaintiff has failed to prove any legal damages.

Defendant further moves the Court to exclude from its consideration all of the evidence introduced on behalf of plaintiff, and requests the Court to find for the defendant, notwithstanding the evidence. [38]

Thereafter on the 14th day of June, 1923, the Honorable Charles S. Lobingier, Judge of the United States Court for China, filed with the Clerk of said court his decision overruling defendant's motion to dismiss the plaintiff's petition and rendering judgment in favor of the plaintiff and against the defendant for the sum of T6,000.00, together with interest from February 28, 1922, and costs. Said decision is as follows: [39]

COPY.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK (Doing Business as MERCHAN-
DISE BROKERAGE COMPANY),

Plaintiff,

vs.

GETZ BROS. OF THE ORIENT, LTD.,
Defendant.

Judgment.

SYLLABUS.

(By the COURT.)

1. PLEADING.—A denial is nullified by a subsequent admission of the same fact.

2. ID.—“All defenses not made in the pleadings are considered waived.”

3. CONTRACTS.—An instrument reciting a sale and providing for “complete delivery and payment” but which also contains a separate and distinct provision for the delivery of unidentified documents under certain conditions, evidences a severable, and not an entire, contract.

4. ID.—The first provision of such a contract may be enforced altho the conditions relating to the second have not been performed.

5. Evidence reviewed and found insufficient to show such nonperformance.

6. PRESUMPTION.—Where material evidence available to a party is not produced, the presumption is that it would be adverse.

Messrs. SCHUHL & SCHOENFELD, by Mr. SCHUHL, for Plaintiff.

Messrs. DAVIES & BRYAN, by Mr. Bryan, for Defendant. [40]

LOBINGIER, J.—On February 3, 1922, defendant, by its manager, signed a document whose provisions, in so far as involved here, are as follows:

“GETZ BROS. & CO., OF THE ORIENT LTD., *have sold* and Merchandise Brokerage *have bought* the following described merchandise, upon the terms and conditions as made herein, and on the reverse side of this contract.

All sales are subject to goods being obtainable. * * *

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922. * * *

Quantity	Description	Price U. S. Gold
370 Tons.	(More or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.	

Say Three hundred sixty to Three hundred seventy-one tons at Shanghai Taels 2.75 per picul of 133 $\frac{1}{3}$.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on

Quantity	Description	Price U. S. Gold
	payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made. * * *	

No claim in respect of the goods, or under this contract, shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai.”

It is expressly admitted that none of these goods were ever delivered and it is undisputed (p. 3) that plaintiff was ready to make payment on the date fixed for delivery.

Defendant’s counsel in argument contends that the parties never reached the stage of a contract. His answer

“admits executing the document * * * mentioned * * * but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant’s home office as provided for in said document.”
(par. 2.) [41]

Now it is nowhere “provided in said document” that the same—i. e. the “contract of sale”—be “confirmed by defendant’s home office.” On the contrary the document recites the sale as already effected. “Getz Bros. & Co. *have sold* and Merchandise Brokerage *have bought*” etc. Surely such a transaction needed no confirmation. The docu-

ment recites an executed contract of sale, not an *offer* to sell. Had it been a mere offer defendant would hardly have accepted, and plaintiff would hardly have paid, \$900 of the price.

It is true that another portion of the document declares that "written confirmation *will* be made," (not that it must be); but the context indicates that it applies to something else than the contract of sale and if it were intended to apply to the latter it could have no effect upon a contract already executed. Since no other reason is alleged for impugning the contract we must regard the denial in paragraph 2 as insufficient.

That counsel himself so regarded it, seems indicated by the subsequent averment

"if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties." (par. 6.)

Not only is no proof of cancellation offered but the averment itself seems a qualified admission that there was a contract and, therefore, nullifies the denial.¹ Again the very clause invoked by defendant, and last above quoted speaks of the instrument sued upon as "this contract" while in its letter (Ex. D) of February 14, 1922, eleven days after the instrument was signed, defendant expresses

"regret that we cannot carry out *our contract* with you."

Almost a week later defendant wrote again "to

¹ Veasey vs. Humphreys, 27 Or. 515, 41 Pac. 8 (per Wolverton, J.); Derby vs. Gallup, 5 Minn. 119.

advise that we have been holding for the above (plaintiff) approximately fifty (50) tons of Plate Cuttings that were shipped for our stock." (Ex. A.) It is undisputed (p. 3) that this lot was a part of the [42] original cargo forming the subject matter of the sale which defendant not only does not question, but appears to recognize in this letter. Surely it would seem to be estopped from denying that there was a contract. Clearly also authorities are not in point which construe mere conditional offers.

II.

While only a part of it is pleaded and relied upon in the answer, counsel's main reliance in argument is upon the following provision of the instrument sued on:

"We agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be received approximate seven (7) days when written confirmation will be made."

It will be seen that this does not, in terms, qualify the provisions above discussed and which in the instrument are separated from it by considerable other matter. The clause in question does not, in other words, provide, or even hint, that the sale and delivery of, or payment for, the goods are conditioned upon the receipt of "cable advice from our Home Office." On the contrary "payment" is assumed as something already fixed and upon it is conditioned the delivery not of cargo—which had already been provided for absolutely—but of "docu-

ments.” What these were we are left to conjecture and no attempt was made to explain the ambiguity by evidence. If they were shipping papers they were clearly unnecessary for delivering the goods for these, it is undisputed (p. 3), had been landed in Shanghai before the contract was signed.

It is evident, then, that we are here considering an independent provision, separate and distinct from the portion which recites the sale as a *fait accompli* and provides for “complete delivery and full payment” respecting the goods. The instrument before us, in other words, evidences not an *entire* but a *severable* [43] contract²—i. e. it contains not only a memorandum of sale requiring “complete delivery and full payment” but also a distinct provision regarding unidentified documents. Now it is one of the characteristics of a *severable* contract that one portion of it may be enforced even tho there can be no recovery as to another and distinct portion.³ At most such would be the result of accepting counsel’s contention here. If it were true that the provision relied upon and last quoted has not been complied with, that would not prevent recovery for the breach of the separate and distinct

²Corpus Juris, XIII, 561. Cf. p. 562 for “illustrations of severable contracts” and Page, Contracts, III, sec. 1483 *et seq.* John Layton Co. vs. Blomberg, 1 Extrater., 827–830.

³Page, Contracts, III, sec. 1483; Katz vs. Bedford, 77 Cal. 319, 19 Pac. 523, 1 L. R. A., 826; McGrath vs. Cannon, 55 Minn. 457, 57 N. W. 150; Burwell etc. Co. vs. Wilson, 57 Neb. 396, 77 N. W. 762; Hutchens vs. Sutherland, 22 Nev. 363, 40 Pac. 409.

agreement to deliver the goods which defendant had "sold," and plaintiff had "bought."

But we are unable to find that noncompliance with the provisions relied upon has been shown. Defendant offered no evidence in support of that contention and the letter (Ex. D.) of its manager seems quite unsatisfactory on that point. It does not mention any "cable advice" nor state whether "our home office permits sale without suit against original buyers." The letter merely states that "they * * * advise us to take legal proceedings" —against whom or for what purpose is nowhere suggested in the letter. And when we turn to the evidence, the omissions of the letter seem even more significant. For it is undisputed (p. 3) that defendant's manager, while claiming to have "received a cable from his home office" * * * "would not" show it and "was not willing to do so." Defendant's counsel stated in open court that the cable was in his office but neither was it produced nor was the manager called nor was his absence explained. The rule is that where a party fails to produce in support of his contention available evidence, it is presumed to be adverse. As was said by the Supreme Court⁴

⁴Kirby vs. Tallmadge, 160 U. S. 379, 40 L. ed. 463, quoting Starkie on Ev. I, 54. See also The New Yor, 175 U. S. 204, 44 L. ed. 126; Clifton vs. U. S., 4 How. 242, 11 L. ed. 957; The M. E. Luckenbach, 174 Fed. 265; The Luckenbach, 144 Fed. 980; The Georgetown, 135 Fed. 854; The Bombay, 46 Fed. 665; The Fred. M. Lawrence, 15 Fed. 635; The Freddie L. Porter, 8 Fed. 871.

“The conduct of the party in omitting to produce [44] that evidence in elucidation of the subject matter in dispute, which is within his power and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudices.”

Finally there is the undisputed fact (p. 3) that the manager did not “take legal proceedings against the original purchasers,” as he naturally would have done had such instructions been received from the home office. On the contrary the manager states in his letter (Ex. “D.”) that “the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.” Clearly we could not find from this evidence that “cable advice from the home office” did not “permit sale without suit against original buyers.” The inference to be drawn from the manager’s course of action seems quite the contrary for it is undisputed (p. 3) that he did sell “to a different party.”

The contention that plaintiff did not present its claim “within seven days after the buyers have been notified of the arrival of the goods in Shanghai” is not pleaded in the answer and “all defenses not made in the pleadings are considered waived.”⁵

It may be observed, however, that there is a total lack of evidence that plaintiff was ever “notified of the *arrival* of the goods in Shanghai.” He knew,

⁵Cyc. XXI, 128.

indeed, that they were here when the contract was signed but as to their *arrival* nothing is said. Besides knowledge is not the same as notice “for knowledge may exist within notice and there may be notice without any actual knowledge.”⁶ In order to invoke the clause, defendant must show that it “notified (plaintiff) of the arrival of the goods”—which it seems never to have done. The clause is a highly technical one and must be invoked most strongly against its originator. Indeed it is doubtful if the contract was even [45] signed within seven days of the arrival of the goods, and if not, compliance with counsel’s construction of it would have been impossible.⁷

We must find, therefore, that defendant committed a breach of its contract to deliver these goods and the evidence renders it easy to assess plaintiff’s damages. His testimony (p. 5) is undisputed that he suffered a loss of Tls. 6,000., that “the purchase price under the contract was Tls. 2.75 per picul. There was approximately six thousand piculs and the market price was approximately Tls. 1.00 higher and I could have sold for Tls. 3.75.” Not only is this undisputed but it is corroborated by two other witnesses (pp. 10, 11) dealing in the goods forming the subject matter of the sale. Defendant produced no competent evidence as to value and we must, therefore, overrule defendant’s motion to dismiss and find that the difference between the contract price and the market price at

⁶Bishham, *Equity* (7th ed.), 397.

⁷See Anson, *Contracts* (Huffcutt’s ed.) sec. 410.

the time and place of delivery⁸ was six thousand (6000) taels, for which sum with interest thereon from February 28, 1922, the agreed date of delivery, together with costs, judgment is accordingly rendered in favor of plaintiff and against defendant.

By the Court.

CHARLES S. LOBINGIER,
Judge. [46]

Judgment. Filed June 14, 1923. W. A. Chapman, Clerk.

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Exception to Order Overruling Motion to Dismiss
Petition.**

Comes now the defendant through its attorneys, Messrs. Davies & Bryan, and excepts to the order of the Court filed on June 14, 1923, overruling defendant's motion to dismiss plaintiff's petition.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

⁸Cyc. XXXV, 633.

Exception. Filed at Shanghai, China, this 15 day of June, 1923. (Sgd.) W. A. Chapman, Clerk.
[47]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Notice of Appeal.

Comes now the defendant through its Attorneys, Messrs. Davies & Bryan, and hereby excepts to the judgment of the Court filed at Shanghai, China, on the 14th day of June, 1923, and said defendant hereby gives notice of intention to appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit.

(Sgd.) DAVIES & BRYAN,
Counsel for Defendant.

Notice of Appeal. Filed at Shanghai, China, this 15th day of June, 1923. (Sgd.) W. A. Chapman, Clerk.

And thereafter on the 15th day of June, 1923, the defendant filed with the Clerk of the United States Court for China a formal exception in writing to

said decision of the Court overruling defendant's motion made at the conclusion of plaintiff's case to dismiss plaintiff's petition, which said defendant hereby designates as its

EXCEPTION No. 5.

And on said 15th day of June, 1923, defendant filed a written exception to said decision of the Court rendering judgment against said defendant in the sum of Taels Six Thousand (T6,000.00), together with interest from February 28, 1922, and costs, which said defendant hereby designates as its

EXCEPTION No. 6.

and simultaneously filed with the Clerk of said Court on June 15, 1923, a notice of appeal. [48]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE
BROKERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Notice of Motion.

Please take notice that Getz Bros. & Company of the Orient, Ltd., the defendant herein, through its attorneys, Messrs. Davies & Bryan, will call up

for hearing on Monday, June 25, at 3 P. M., in the Courtroom of the United States Court for China defendant's petition for a writ of error to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and at the same time will request the Honorable Charles S. Lobingier, Judge of the United States Court for China, (1) To allow, settle and seal defendant's bill of exceptions; (2) To sign the order allowing defendant's writ of error; (3) To sign the citation on writ of error requiring plaintiff to appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit within a specified number of days; (4) To sign an order extending the time within which to file the record and docket the case in the United States Circuit Court of Appeals for the Ninth Judicial Circuit; and (5) To fix and approve the amount of defendant's supersedeas bond.

DAVIES & BRYAN,
Attorneys for Defendant.

Notice of motion received this the 23d day of June at 10:00 A. M. o'clock.

(Sgd.) SCHUHL & SCHOENFELD,
Attorneys for Plaintiff.

Notice of Motion. Filed at Shanghai, China, this 23d day of June, 1923. W. A. Chapman, Clerk.
[49]

Order Allowing and Settling Bill of Exceptions.

Now, on the seventh day of July, 1923, two days after the filing by defendant of its second and final copy of "assignment of errors," this cause comes on for hearing upon the defendant's motion of June 23, 1923.

Upon consideration whereof the foregoing bill of exceptions, consisting of pages 6 to 49, inclusive, is hereby allowed, settled and incorporated in the record herein.

CHARLES S. LOBINGIER,
Judge, United States Court for China. [50]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and style of THE MERCHANDISE BROKER-
AGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Assignment of Errors.

Now comes the defendant in the above-entitled action, being the plaintiff in error herein, and in connection with its petition for writ of error makes the following assignment of errors, which it avers

occurred in the trial and decision of this cause in said Court, to wit:

1. That the United States Court for China erred in overruling defendant's demurrer to plaintiff's petition by its order filed with the Clerk of said Court on April 19, 1923.

BEING EXCEPTION No. 1.

2. That the said United States Court for China erred in overruling defendant's demurrer to plaintiff's petition by its order filed with the Clerk of said Court on April 19, 1923, for the following reasons:

(a) Because plaintiff's petition states no cause of action against defendant.

(b) Because the contract relied upon by the plaintiff, a portion of which is quoted in said order overruling defendant's demurrer was made upon certain express terms and conditions, two of which are, (1) The receipt of cable advice from defendant's home office permitting sale without suit against original buyer; and (2) That written confirmation will be made.

(c) Because plaintiff's petition contains no paragraph alleging, (1) That defendant was in receipt of cable advice from its home office permitting sale without suit against original buyers; and (2) That written confirmation had been made. [51]

3. That said United States Court for China erred in holding in its order filed with the Clerk of said Court on the 19th day of April, 1923, over-

ruling defendant's demurrer to plaintiff's petition that,

“A sale of merchandise with an undertaking for complete delivery by a certain date from Shanghai stock is not rendered conditional by a further clause requiring delivery of shipping documents on payment if cable advices from home office permits.”

because neither plaintiff's petition nor the contract, if any, relied upon by plaintiff and attached to his petition contain the words “shipping documents.”

4. That said United States Court for China erred in its order overruling defendant's demurrer to plaintiff's petition filed with the Clerk of said Court on April 19, 1923, in distinguishing the case of

Hsieh Po-Hsiang vs. Shippers Commercial Corp., I Extraterritorial Cases, p. 1010.

5. That said Court erred in overruling defendant's motion made at the conclusion of plaintiff's case to dismiss plaintiff's petition, notwithstanding the evidence,

BEING EXCEPTION No. 2.

6. That said United States Court for China erred in sustaining plaintiff's application to strike out testimony on the ground of hearsay,

BEING EXCEPTION No. 3.

7. That said United States Court for China erred in sustaining plaintiff's objection to the following question:

“What was the market price of mild steel plate cuttings from inquiries which you made yesterday?”

BEING EXCEPTION No. 4.

8. That said United States Court for China erred in failing to rule upon defendant's motion made at the conclusion of plaintiff's case to exclude from its consideration all of the evidence introduced on behalf of plaintiff.

9. That said United States Court for China erred in [52] failing to rule upon defendant's request made at the conclusion of plaintiff's case to find for the defendant, notwithstanding the evidence.

10. That said United States Court for China erred in overruling defendant's motion to dismiss the petition made at the conclusion of plaintiff's case,

BEING EXCEPTION No. 5.

11. That said United States Court for China erred in rendering judgment against the defendant and in favor of the plaintiff for the sum of Taels Six Thousand (T6,000.00), together with interest thereon from February 28, 1922, and costs,

BEING EXCEPTION No. 6.

12. That said United States Court for China erred in not holding in its written decision filed with the Clerk of said Court on the 14th day of June 1923, according to the express terms of the contract, if any, relied upon by plaintiff, that the following were a part of the terms and conditions thereof:

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

13. That said United States Court for China erred in holding that paragraph 6 of defendant's answer was a qualified admission that there was a contract, and therefore nullified the denial made in paragraph two of said answer.

14. That said United States Court for China erred in holding that paragraph 6 of defendant's answer was a qualified admission that there was a contract, and therefore nullified the denial made in paragraph two of said answer, for the following reasons:

(a) Because plaintiff's counsel failed to make any motion, request or other application for judgment on the pleadings, as the record will show.

(b) Because the question of the qualified admission of the contract by paragraph 6 of defendant's answer was raised by the Court without any request, [53] motion or other application made by plaintiff, as the record will show.

(c) Because plaintiff waived the qualified admission, if any, contained in paragraph six of defendant's answer by failing to make any motion, request or application for judgment on the pleadings prior to the rendition of the Court's decision filed with the Clerk of said Court on June 14, 1923.

(d) Because even if paragraph 6 of defendant's answer was a qualified admission that there was a contract it was also an allegation that the contract had been cancelled.

(e) Because the pleadings presented a material issue.

(f) Because the answer states sufficient facts to constitute a defense to the action.

(g) Because paragraph 6 of defendant's answer states facts sufficient to constitute a defense to the action.

(h) Because defendant's answer contained denials of material allegations in plaintiff's complaint.

(i) Because the facts admitted on the pleadings do not show that the plaintiff would be entitled to judgment.

(j) Because where a party moves for judgment on a pleading the allegations of his adversary's pleadings are to be accepted as true for the purposes of a motion.

(k) Because where a party moves for judgment on the pleadings he not only for the purposes of his motion admits the truth of the allegation of his adversary, but admits the untruth of all his own allegations which have been denied by his adversary.

(l) Because the court went outside of the pleadings in determining that paragraph 6 of defendant's answer was a qualified admission of a contract.

15. That said United States Court for China erred in holding in its written decision filed with

the Clerk of said Court on the 14th day of June, 1923, that the following provision contained in the contract, if any, relied upon by plaintiff, which is quoted in the Court's decision.

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

was severable and divisible from the balance of said contract, if any. [54]

16. That said United States Court for China erred in holding in its written decision filed with the Clerk of said Court on the 14th day of June, 1923, that the following provision contained in the contract, if any, relied upon by plaintiff, which is quoted in the Court's decision,

“Receipt of deposit T900.00 is hereby acknowledged, and we agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximately seven days, when written confirmation will be made.”

was severable and divisible from the balance of said contract, if any, for the following reasons:

(a) That the portion above quoted of said contract, if any, is not severable from the balance of said contract as a matter of law.

(b) Because said contract, if any, relied upon by plaintiff contains the following clause: "Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, UPON THE TERMS AND CONDITIONS AS MADE HEREIN AND ON THE REVERSE SIDE OF THIS CONTRACT."

(c) Because the portion above quoted of said contract, if any, was just as much a term and condition thereof as any other clause thereof.

(d) Because said contract, if any, was made for the purchase of one quantity of goods for one consideration.

17. That said United States Court for China erred in holding that defendant had waived the right (by failure to plead it) to rely upon the following clause in the contract, if any, relied upon by plaintiff:

"No claim in respect of the goods or under this contract shall be made against the sellers unless it be made within seven days after the buyers have been notified of the arrival of the goods in Shanghai."

18. That said United States Court for China erred in holding that there was a total lack of evidence that plaintiff was ever notified of the arrival of the goods in Shanghai.

19. That said United States Court for China erred in holding that no proof was offered of cancellation of the contract, [55] if any, relied upon by plaintiff.

20. That said United States Court for China erred in holding,

“An instrument reciting a sale and providing for ‘complete delivery and payment’ but which also contains a separate and distinct provision for the delivery of unidentified documents under certain conditions, evidences a severable, and not an entire, contract.”

and that

“The first provision of such a contract may be enforced although the conditions relating to the second have not been performed.”

for the following reasons:

(a) Because the contract contains no separate and distinct provision as to the delivery of unidentified documents.

(b) Because the plaintiff in its petition relied upon the contract as a whole and did not plead that it was severable and divisible.

(c) Because plaintiff failed to raise at the trial, as the record will show, the question of the severability of said contract, if any, relied upon.

21. That said United States Court for China erred in applying the principle that where material evidence available to a party is not produced the presumption is that it would be adverse.

22. That said United States Court for China erred in applying the principle that where material evidence available to a party is not produced the presumption is that it would be adverse, for the following reasons:

(a) Because said Court failed to rule upon defendant's motion to dismiss plaintiff's petition until it rendered final judgment.

(b) Because the principle that where material evidence available to a party is not produced the presumption that it would be adverse cannot be applied in making a ruling on a motion to dismiss plaintiff's petition.

23. That said United States Court for China erred in holding in its written decision filed with the Clerk of said Court [56] on the 14th day of June, 1923, that all defenses not made in the pleadings are considered waived.

24. That said United States Court for China in reviewing the evidence erred in finding it insufficient to show nonperformance on the part of the plaintiff.

25. That said United States Court for China erred in holding that the amount of damages was undisputed and corroborated by two other witnesses dealing in the goods forming the subject matter of the sale.

26. That said United States Court for China erred in holding that defendant had failed to produce any competent evidence as to value.

27. That said United States Court for China erred in not holding that the evidence was insufficient considered in any light to render judgment in favor of the plaintiff and against the defendant.

28. That said United States Court for China erred in failing to rule upon defendant's motion and request made at the conclusion of the case to

exclude from its consideration all the evidence introduced by plaintiff and to give judgment for the defendant, notwithstanding the evidence.

29. That said United States Court for China erred in not rendering judgment in favor of the defendant and against the plaintiff.

WHEREFORE, defendant prays that said judgment be reversed and that the defendant be allowed to depart hence and recover its costs.

DAVIES & BRYAN,
Attorneys for Defendant.

Assignment of Errors. Filed at Shanghai, China, this 5th day of July, 1923. W. A. Chapman, Clerk.
[57]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT LTD.,
Defendant.

Petition for Writ of Error.

To the Honorable, the United States Court for
China:

Getz Bros. & Co. of the Orient, Ltd., the defendant in the above-entitled action, feeling itself aggrieved by the judgment of the Court entered in

favor of the plaintiff in said cause on the 14th day of June, 1923, whereby it was adjudged that the plaintiff recover of and from the defendant the sum of Taels Six Thousand (T6,000.00), Shanghai Sycee, together with interest thereon from February 28, 1922, and costs, taxed at the sum of Mex. \$71.06, comes now by Davies & Bryan, its attorneys, and petitions said Court for an order allowing it to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and in this behalf alleges that in said judgment and in the proceedings had prior thereto in said action certain errors were committed to the prejudice of this defendant, all of which will appear more in detail from the assignment of errors which is filed with the petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings [58] and papers in this case, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order may be made by this Court fixing the amount of security which said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: Shanghai, June 23d, 1923.

GETZ BROS. & CO. OF THE ORIENT,
LTD., a Corporation,

By DAVIES & BRYAN,
Its Attorneys.

Petition for Writ of Error. Filed at Shanghai,
China, this 23d day of June, 1923. W. A. Chap-
man, Clerk. [59]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Order Allowing Writ of Error.

This 7th day of July, 1923, came the defendant,
by its attorneys Messrs. Davies & Bryan, and filed
herein and presented to the Court its petition for
the allowance of a writ of error, an assignment of
errors intended to be urged by it, praying also that
a transcript of the record and proceedings and
papers upon which the judgment herein was ren-
dered, duly authenticated, may be sent to the United
States Circuit Court of Appeals for the Ninth Ju-
dicial Circuit, and that such other and further

proceedings may be had as may be proper in the premises.

On consideration whereof, IT IS HEREBY ORDERED that a writ of error as prayed for in said petition be allowed and that the amount of the supersedeas bond to be given by the defendant upon said writ of error be and the same is hereby fixed at the sums of Shanghai Taels Six Thousand (Sh. T6,000.00), being principal, Shanghai Taels Nine Hundred and Thirty (Sh. T930.00), being interest, and Mexican Dollars Eighty-five and 86/100 (Mex. \$85.86), being costs, together with interest on said sums from June 14, 1923, to time of payment, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded [60] pending the determination of such writ of error by the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: Shanghai, July 7, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Order Allowing Writ of Error. Filed at Shanghai, China, this 7th day of July, 1923. W. A. Chapman. [61]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BROK-
ERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT LTD.,
Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Getz Bros. & Co. of the Orient, Ltd., a corpora-
tion, as principal, and Asia Banking Corporation,
as surety, are jointly and severally held and firmly
bound unto the plaintiff in the above-entitled action
in the sums of Taels Six Thousand (T6,000.00),
Shanghai Sycee, being principal, Taels Nine Hun-
dred and Thirty (T930.00,) Shanghai Sycee, being
interest, and Mexican dollars Eighty-five and
86/100 (Mex. \$85.86), being costs, together with in-
terest on said sums from June 14, 1923, to time of
payment, to which payment well and truly to be
made we bind ourselves and each of us jointly and
severally, and each of our successors, representa-
tives and assigns, firmly by these presents.

SIGNED with our seals and dated this 29th day
of June, 1923.

WHEREAS, the above-named defendant is about
to sue out a Writ of Error to the United States
Court of Appeals in and for the Ninth Circuit to

reverse the judgment heretofore rendered in the above-entitled action in favor of the plaintiff therein and against the defendant therein, and awarding judgment in favor of the plaintiff therein for the sum of Tael Six Thousand (T6,000.00), Shanghai Sycee, together with interest thereon from February 28, 1922, [62] which amounts to Tael Nine Hundred and Thirty (T930.00), Shanghai Sycee, and costs in the sum of Mexican Dollars Eighty-five and 86/100 (Mex. \$85.86).

NOW, THEREFORE, the conditions of this obligation are such that if the above-named defendant shall prosecute such writ of error to effect and shall answer all damages, costs and interest if it shall fail to make good its plea then this obligation shall be void, otherwise to remain in full force and effect.

GETZ BROS. & CO. OF THE ORIENT,
LTD.,

By T. L. Parkhurst,
Manager.

Witness:

W. A. CHAPMAN.

ASIA BANKING CORPORATION,

By M. C. Cooke.

We agree to the above and foregoing bond.

SCHUHL & SCHOENFELD,

By F. J. Schuhl,

Attorneys for Plaintiff.

The foregoing bond is hereby approved this 5th day of July, 1923.

CHARLES S. LOBINGIER,
Judge of the United States Court for China.

Bond on Writ of Error. Filed at Shanghai, China, this 5th day of July, 1923. W. A. Chapman, Clerk. [63]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Praeipie for Transcript of Record.

To the Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error allowed in the above-entitled cause and to include in such transcript of record the following and no other papers or exhibits, to wit:

Petition. Filed March 28, 1922.

Defendant's demurrer. Filed April 10, 1922.

Defendant's exception to order overruling demurrer. Filed April 21, 1923.

Defendant's answer. Filed April 26, 1923.

Defendant's motion to dismiss plaintiff's petition.

Filed in open court on June 12, 1923.

Defendant's exception to order overruling defendant's motion to dismiss the petition. Filed April 15, 1923.

Defendant's exception to the judgment of the Court rendered on April 14, 1923, and notice of appeal. Filed April 15, 1923.

Plaintiff's Exhibits "A," "B," "C" and "D" and Defendant's Exhibit "1."

Bond on writ of error. Filed July 5, 1923. [64]

Petition for writ of error.

Bill of exceptions, filed July 7th, including order of Court overruling defendant's demurrer, filed April 19, 1923, and the decision of the Court filed on June 14, 1923.

Defendant's assignment of error. Filed July 5, 1923.

Writ of error.

Citation on writ of error.

Order allowing writ of error.

Praeceptum for transcript.

Order extending time to file record in Circuit Court of Appeals.

Clerk's certificate of record.

Notice of motion to allow bill of exceptions and writ of error. Filed June 23, 1923.

And file said transcript with the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

DAVIES & BRYAN,
Attorneys for Defendant.

Praeceptum for Transcript of Record. Filed at Shanghai, China, this 23d day of June, 1923. W. A. Chapman, Clerk. [65]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America:

To the Honorable Judge of the United States
Court for China, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said United States Court for China, before you, between H. M. Shirek, doing business under the name and style of the Merchandise Brokerage Co., plaintiff, and Getz Bros. & Co. of the Orient, Ltd., defendant, a manifest error hath happened, to the great damage of the said Getz Bros. & Co. of the Orient, Ltd., defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concern-

ing the same, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you have the same at San Francisco, in said Circuit, on the day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according [66] to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 7th day of July, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

Attested:

W. A. CHAPMAN,

Clerk of the United States Court for China.

Writ of Error. Filed at Shanghai, China, this 7th day of July, 1923. W. A. Chapman, Clerk.
[67]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Order Extending Time to August 31, 1923, to File
Record and Docket Cause.**

For satisfactory reasons appearing to the Court, the time for filing the record in this cause in the Circuit Court of Appeals for the Ninth Judicial Circuit, pursuant to the writ of error sued out, is extended until the 31st day of August, 1923.

CHARLES S. LOBINGIER,
Judge of the United States Court for China.

Order Extending Time to August 31, 1923, to File
Record and Docket Cause. Filed at Shanghai,
China, this 9th day of July, 1923. W. A. Chapman,
Clerk. [68]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

VS.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

Citation on Writ of Error.

United States of America,—ss.

To H. M. Shirek, doing business under the name
and style of the Merchandise Brokerage Co.,
GREETING:

You are hereby cited and admonished to be and

appear at the next session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, to be held at the City of San Francisco within 55 days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the United States Court for China, wherein Getz Bros. & Co. of the Orient is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles S. Lobingier, Judge of the United States Court for China, this 7th day of July, 1923.

CHARLES S. LOBINGIER,

Judge of the United States Court for China.

We hereby, this 21st day of July, 1923, accept due personal service of this citation on behalf of H. M. Shirek, doing business under the name and style of The Merchandise Brokerage Co.

SCHUHL & SCHOENFELD,

Attorneys for Defendant in Error.

Citation on Writ of Error. Filed at Shanghai, China, this 7th day of July, 1923. W. A. Chapman, Clerk. [69]

In the United States Court for China.

Cause No. 1676—Civil No. 578.

H. M. SHIREK, Doing Business Under the Name
and Style of THE MERCHANDISE BRO-
KERAGE CO.,

Plaintiff,

vs.

GETZ BROS. & CO. OF THE ORIENT, LTD.,
Defendant.

**Certificate of Clerk United States Court for China
to Transcript of Record.**

Shanghai, China,—ss.

In pursuance of the command of the writ of error within, I, William A. Chapman, Clerk of the United States Court for China, herewith transmit a true copy of the record, bill of exceptions, assignments of error and all proceedings in this case of H. M. Shirek, doing business under the name and style of The Merchandise Brokerage Co., the plaintiff, vs. Getz Bros. & Co. of the Orient, Ltd., the defendant, lately pending in the United States Court for China, under my hand and the seal of said Court.

Witness my official signature and the seal of said United States Court for China at the City of Shanghai, within the jurisdiction of said Court this 10th day of July, 1923.

[Seal]

W. A. CHAPMAN,
Clerk of the United States Court for China.

Certificate of Clerk, United States Court for China to Transcript of Record. Filed at Shanghai, China, this 10th day of July, 1923. W. A. Chapman, Clerk. [70]

[Endorsed]: No. 4079. United States Circuit Court of Appeals for the Ninth Circuit. Getz Bros. & Co. of the Orient, Limited, Plaintiff in Error, vs. H. M. Shirek, Doing Business Under the Name and Style of The Merchandise Brokerage Company, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Court for China. Filed August 18, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4079

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GETZ BROS. & CO. OF THE ORIENT, LIMITED,
Plaintiff in Error,
vs.

H. M. SHIREK, Doing Business Under the Name and Style
of The Merchandise Brokerage Company,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Plaintiff in Error.

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No. 4079

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

GETZ BROS. & CO. OF THE
ORIENT, LIMITED,

Plaintiff in Error,

vs.

H. M. SHIREK, Doing Business
Under the Name and Style of THE
MERCHANDISE BROKERAGE COM-
PANY,

Defendant in Error.

No. 4079

BRIEF OF PLAINTIFF IN ERROR

Statement of the Case.

Plaintiff in error, the defendant in the lower Court, has sued out this writ of error to the United States Court for China, from the judgment of the latter

Court in an action for damages for breach of an alleged contract in writing for the sale by plaintiff in error to defendant in error, plaintiff below, of 370 tons of mild steel plate cuttings. The alleged contract is set forth at length in the Transcript (pp. 3-10), but the portion thereof material to the consideration of the point to be urged for a reversal of the judgment of the lower Court is contained in the first part thereof, appearing on pages 3 and 4 of the Transcript. This portion of the alleged contract is as follows:

“Contract.

Getz Bros. & Co. of the Orient, Ltd.

Shanghai, February 3d, 1922.

Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, *upon the terms and conditions named herein and on the reverse side of this contract.*

All sales are subject to goods being obtainable.

Seller is not responsible for non-delivery by reason of loss of cargo en route, fire or any unavoidable casualties, or for delays beyond their control.

To be insured against war risk at buyer's expense.
Terms—

Shipment: Delivery from Shanghai stock.

Remarks: Complete delivery and full payment to be made on or before February 28th, 1922.

Quantity	Description	Price
		U. S. Gold

370 Tons (more or less) covering all Mild Steel Plate Cuttings all sizes and test pieces held in our

Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.

Say Three hundred sixty to Three hundred seventy-one Tons at Shanghai Taels 2.75 per picul of 133 1/3.

Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be received approximate seven (7) days when written confirmation will be made. Approved by seller.

Getz Bros. & Co. of the Orient, Ltd.

(Signed) By T. L. Parkhurst,
Manager."

(Italics ours.)

The remaining portion of the alleged contract is headed "Conditions," and will be incidentally referred to hereafter.

This instrument having been signed and delivered, defendant in error, on February 3, 1922, made the deposit of 900 taels referred to therein (Tr., p. 18), and nothing further was done with reference to the matter until about the 12th or 13th of February, when Mr. Parkhurst, the manager of the Shanghai office of plaintiff in error, stated to defendant in error that he had received a cable from his home office which advised him to proceed legally against the original purchasers of the cargo (Tr., p. 19). On February 14, plaintiff in error wrote defendant in error the fol-

lowing letter (Plaintiff's Exhibit "D," Tr., pp. 42-43):

"Getz Bros. & Co. of the Orient, Ltd.
Incorporated.
Exporters and Importers.

Whiteaway, Laidlaw Bldg.,
Nanking Road, Cor. Szechuen.
Shanghai, China, February 14th, 1922.

The Merchandise Brokerage Co.,
No. 7 Ezra Road, Shanghai.
Attention: Mr. H. M. Shirek.

CONTRACT FOR PLATE CUTTINGS

Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

'Re Plate Cuttings stock—we understand legally must sue buyers before selling.'

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability (*sic*) of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

Getz Bros. & Co. of the Orient, Ltd.,

By T. L. Parkhurst,

Manager.

TLP/RA

Enclos: cheque."

The letter just quoted was the only writing referring to the alleged contract received by defendant in error from plaintiff in error after the delivery of the alleged contract of February 3 (Tr., p. 23), other than the check for 900 taels, which defendant in error received with the letter and cashed (Tr., p. 24).

After the receipt of this letter, defendant in error, through his attorneys, demanded of plaintiff in error the delivery of the 370 tons of plate cuttings (Plaintiff's Exhibit "B," Tr., p. 40), and plaintiff in error made an offer to let defendant in error have 50 tons of cuttings (Plaintiff's Exhibit "A," Tr., pp. 39, 40). This offer was declined (Plaintiff's Exhibit "C," Tr., p. 41), and suit was thereupon instituted. Plaintiff in error's demurrer having been overruled, issue was joined, and on the trial of the case judgment was rendered in favor of defendant in error for 6000 taels, and interest (Tr., p. 57).

Specification of Errors Relied Upon by Plaintiff in Error.

Plaintiff in error relies upon one fundamental error of the lower Court, namely, that the Court erroneously construed the instrument, dated February 3, 1922, upon which the suit was brought, as a completed contract of purchase and sale, whereas the instrument shows on its face that it was nothing more than a tentative offer, subject to written confirmation to be later given or withheld at the option of plaintiff in error, after

communication between its Shanghai office and its home office. This error of the Court necessarily involves the overruling of the demurrer (Assignments of Error Nos. 1, 2, 3 and 4, Tr., pp. 61-63), the denial of the motion to dismiss notwithstanding the evidence (Assignments of Error Nos. 5, 8, 9 and 10, Tr., pp. 63, 64), and the rendition of judgment in favor of defendant in error (Assignments of Error Nos. 11, 12, 13, 14, 15 and 16, Tr., pp. 64-68, and No. 29, Tr., p. 71).

Argument.

As stated in the foregoing specifications of error, the sole point presented for the consideration of this Court is the proper construction of the instrument dated February 3, 1922, and the judgment of the lower Court must stand or fall on such construction. In order properly to construe this instrument, it is necessary to analyze it at some length.

**An Analysis of the Alleged Contract Shows That the Instrument
Was Obviously Partly Printed and Partly Filled In
In Writing or Typewriting.**

Upon an examination of the terms of the instrument sued on (Tr., pp. 3, *et seq.*), it is at once apparent that it is full of inconsistencies. It is perhaps unfortunate that the original instrument, itself, was not introduced upon the trial, for, by its production, we would have direct proof of what, in the present state of the record, we can only demonstrate by inference, namely, that *in the preparation of the instrument a printed stock form was used and the particulars applying to the transaction in question were filled in in typewriting or other writing. The very inconsistencies in the agreement demonstrate this fact.*

The first sentence of the instrument reads as follows (Tr., p. 3):

“Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, upon the terms

and conditions as named herein, and *on the reverse side of this contract.*" (Italics ours.)

The instrument as printed in the Transcript occupies over seven pages thereof, and, if it were written or typewritten, it would undoubtedly occupy as many or more pages of ordinary size, yet it is apparent from the italicized clause above quoted that the form of the instrument was such that the "terms and conditions" thereof were set forth on two pages, the one on which the clause referred to appears and the "reverse side" thereof.

The next three sentences are as follows (Tr., p. 3):

"All sales are subject to goods being obtainable.

"Seller is not responsible for non-delivery by reason of loss of cargo en route, fire or any unavoidable casualties, or for delays beyond their control.

To be insured against war risk at buyer's expense." (Italics ours.)

Under the heading of "terms," we find the following (Tr., p. 3):

"Shipment, Delivery from Shanghai stock."

The evidence, as well as the clause last quoted, shows that the goods were in Shanghai, and that plaintiff in error had inspected them (Tr., pp. 24, 25), yet the instrument provides against the goods being unobtainable and against non-delivery by reason of loss of cargo en route, conditions clearly inapplicable

to the plate cuttings in question, and for insurance against war risk, when there was no war affecting the Orient in February of 1922.

The next portion of the instrument is as follows (Tr., p. 3):

"Quantity	Description	Price U. S. Gold
370 Tons (more or less)	covering all Mild Steel Plate Cuttings all sizes and test pieces held in our Shanghai Stock covered by Drafts Nos. B. C. 4139, 4137, 4135, 4315, 4323, 2913, 2914, 4362, 4363 and 4373.	

Say Three hundred sixty to Three hundred seventy-one tons at *Shanghai Taels 2.75* per picul of 133 1/3.

Receipt of Deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.

Approved by seller,

Getz Bros. & Co. of the Orient, Ltd.

(Signed) By T. L. Parkhurst,
Manager."

(Italics ours.)

As the price was fixed at "Shanghai taels 2.75 per picul of 133 1/3," it is manifest that the words "Quantity Description Price U. S. Gold" were already in the form used when the rest of the matter above quoted was inserted therein. It seems clear that all of this matter, excepting, possibly, the words "Approved by seller, Getz Bros. & Co. of the Orient,

Ltd. By," was inserted in a blank space ordinarily filled by data as to a number of items, listed under the several columns "Quantity," "Description" and "Price U. S. Gold."

The remainder of the instrument, beginning with the words "Conditions" (Tr., p. 4), must certainly have been a printed or stock form, for nearly every paragraph thereof contains provisions in no way pertinent to the transaction in question, namely, the sale of goods from the Shanghai stock of plaintiff in error. For instance, provision is made for insurance of the goods while "*in the godowns of the steamship company bringing the cargo to Shanghai,*" for insurance "against war risk," for payment of "duties and importation charges," for contingencies whereby "the manufacture, supply, shipment, transit or delivery of the goods is prevented or delayed" (Tr., p. 5), for contingencies such as "the commandeering of Cargo, Railways, Steamships," "the taking over of a large portion of the output of a mill," charges "caused by Government Embargo"; and reference is made to "mill delays," and shipment "either via Pacific Coast or Atlantic Coast" (Tr., p. 6).

It seems unnecessary to quote further from these conditions, which show conclusively that the instrument was prepared on a stock form, prepared during war times, when embargoes and the commandeering of steamships and of the output of mills were contingencies to be guarded against, and war risk insurance

was almost universally taken out on overseas shipments. And it is no guess, but practically a certainty, that the only space in this two-page form in which the conditions and terms constituting the meat of the instrument could be inserted, was under the heading "Quantity Description Price U. S. Gold."

The First Sentence of the Instrument Was Printed.

This sentence reads as follows:

"Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought the following described merchandise, upon the terms and conditions as named herein, and on the reverse side of this contract."

Had this sentence not been part of a stock form (with the exception of the words "Merchandise Brokerage"), it is obvious that the instrument would have been drafted somewhat as follows:

"Getz Bros. & Co. of the Orient, Ltd., have sold and Merchandise Brokerage have bought 370 Tons (more or less)," etc. (describing the merchandise which actually was described half a page farther on), "upon the following terms and conditions," etc.

When the form was adopted, it was intended for general use, hence the words "the following described merchandise" were employed, the space for the description being left below the words "Quantity Description Price U. S. Gold."

The Clauses Which Negative An Actual Contract Were Filled In.

These clauses read as follows:

“Receipt of deposit Taels 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive (d) approximate (ly) seven (7) days when written confirmation will be made.”

The very informality of the clauses last quoted, as distinguished from the careful wording of the “conditions” appearing thereafter, clearly shows a different hand in their phrasing. “Receipt of deposit Taels 900.00” instead of “Receipt of a deposit of 900.00 Taels,” and “Reply should be receive(d) approximate(ly) seven (7) days,” instead of “Reply should be received in approximately seven (7) days,” indicate the hand of a salesman interested in substance only, instead of the work of a careful scrivener mindful of form.

The Reason Advanced by the Lower Court for Its Decision.

The lower Court, in its opinion (Tr., p. 48 *et seq.*), construing the instrument as a completed contract and rendering judgment for defendant in error, based its action on the following propositions:

(a). That the use of the words “have sold” and “have bought” showed the instrument to be an executed contract of sale.

(b). That the provision for written confirmation could not apply to such an executed contract.

(c). That the provision that "we agree to deliver documents on payment if cable advice from our Home Office permits sale" and the subsequent sentence, "Reply will be received approximate seven (7) days when written confirmation will be made," applied only to the delivery of documents and not to the sale itself, and that the contract was severable in this regard.

(d). That the taking of the deposit showed the instrument to have been a completed contract and not an offer.

(e). That the denial that the instrument was a contract, contained in paragraph 2 of the answer, was nullified by the subsequent averment in paragraph 6 thereof that "if any contract existed between the parties, the same has been cancelled."

(f). That the use of the word "contract" in the original instrument and in plaintiff in error's letter of February 14, 1922, was an admission that the instrument was a contract.

(g). That the offer of plaintiff in error to sell defendant in error 50 tons of plate cuttings estopped plaintiff in error from denying the existence of a contract between the parties.

(h). That the facts that plaintiff in error did not offer to produce any cable directing suit to be brought

against the original buyers, that no such suit was brought and that the goods were sold to other persons, showed a breach of contract by plaintiff in error.

We believe we can demonstrate that the Court was in error on each and all of these propositions. In construing the alleged contract and its many provisions, the Court emphasized those provisions which, standing alone, might entitle the defendant in error to judgment, and disregarded or minimized the provisions on which plaintiff in error relied, ignored the connection between the several provisions of the instrument, and, when no better argument offered, declared the instrument to be a severable contract. In order properly to construe the instrument, all of its provisions should have been examined, its inconsistencies reconciled, if possible, and, if they could not be reconciled, those terms which indicate most clearly the intention of the parties should have been given the greater weight.

The Use of the Words "Have Bought" and "Have Sold" Has No Controlling Effect.

The lower Court laid undue stress on the words "have sold" and "have bought" in the opening sentence of the instrument, utterly disregarding the qualifying phrases immediately following. This sentence reads as follows:

"Getz Bros. & Co. of the Orient, Ltd., *have sold* and Merchandise Brokerage *have bought* the

following described merchandise, *upon the terms and conditions as named herein and on the reverse side of this contract.*" (Italics ours.)

Construing this sentence, the Court said (Tr., pp. 50-51):

"Now it is nowhere 'provided in said document' that the same—i. e., 'the contract of sale'—be 'confirmed by defendant's home office.' On the contrary, the document recites the sale as already effected. 'Getz Bros. & Co. *have sold* and Merchandise Brokerage *have bought*,' etc. Surely such a transaction needs no confirmation. The document recites an executed contract of sale, not an offer to sell." (Italics by the Court.)

The Court here overlooked the well recognized fact that, while the words "bought" and "sold" in their primary sense import an executed contract, they are commonly used in executory agreements, and, where qualified by other words or phrases, are construed in the light of the qualifying language used. Such is the rule in California, in the United States Supreme Court, and in many other jurisdictions. In *Walti v. Gaba*, 160 Cal. 324, the Supreme Court of California said (p. 327):

"It is true that the writing states that 'I have this day sold,' etc., but the use of the word sold or the word bought does not always import a present sale, but such words are frequently used where the parties in fact intend only an agreement to sell."

Citing:

Blackwood v. Cutting Packing Co., 76 Cal. 218;
McLaughlin v. Piatti, 27 Id. 458;
Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed.
 863.

"It is conceded, *as of course it must be*, that the word 'sold' does not conclusively show a present conveyance." (Italics ours.)

Estate of Goetz, 13 Cal. App. 198, 201.

In the *Elgee Cotton Cases*, *supra*, the Supreme Court of the United States construed a contract reciting that the vendor had "sold" as an executory contract, and held that no title passed thereunder because it appeared that, under the contract, the goods had first to be weighed in order to ascertain the total price thereof and then to be delivered by the vendor.

The case of *Peatland Realty Co. v. Edwards*, 23 Cal. App. 402, involved a contract for the sale of a jack, which provided that "first party has sold . . . a Blue Jack . . . upon the following conditions." The Court there said (23 Cal. App. 405):

"While it is true, as contended by appellant, that the word 'sold' primarily means a consummated sale, *such meaning is controlled by the context, which here clearly indicates an executory agreement not intended to transfer title save and except upon the performance of the conditions specified.*"

It was there held that, inasmuch as the jack did not fulfill the conditions upon which the sale was to be made, no title passed, and plaintiff could not recover.

In the instant case, the Court paid no attention to the fact that the instrument provided that plaintiff in error had sold "*upon the terms and conditions as named herein and on the reverse side of this contract.*" One of these "*terms and conditions*" was that

"We agree to deliver documents, on payment, *if cable advice from our Home Office permits sale to be made without suit against original buyers.* Reply should be receive(d) approximate(ly) seven (7) days *when written confirmation will be made.*"

If the instrument had provided that "Getz Bros. & Co. of the Orient, Ltd., have sold the following described merchandise, if the Home Office permits the sale to be made without suit against the original buyers, in which case this transaction will be confirmed in writing," it would be merely another way of stating what was in fact the expressed intention of Mr. Parkhurst, the manager of the Shanghai office, when he executed the instrument in question. In neither case would the Court be justified in holding (Opinion, Tr., pp. 50-51) that "the document recites the sale as already effected. . . . The document recites an executed contract of sale, not an *offer* to sell." (Italics by the Court.)

The Court in its opinion (Tr., p. 51) adverted to the fact that

“another portion of the document declares that ‘written confirmation *will* be made’ (not that it must be); but the context indicates that it applies to something else than the contract of sale, and if it were intended to apply to the latter it could have no effect upon a contract already executed.” (Italics by the Court.)

This is begging the question. Under the authorities above quoted, the question whether there was an executed contract is to be determined from the instrument as a whole, not from a blind insistence that the use of the words “bought” and “sold” is conclusive. The reason why the clauses as to the Home Office permitting the sale and as to confirmataion appear as they do in another part of the instrument has been fully discussed and explained above, and the written or typewritten provision as to “confirmation” controls the printed words “bought” and “sold”¹; but even were the instrument not a printed and written instrument, these clauses are none the less “terms and conditions” within the clear import of the first sentence of the instrument.

¹ “Where, as in the use of printed forms, a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing will prevail. Handwriting will, under the same rule, prevail over typewriting, and typewriting over printing.”

Where An Instrument Calls for Subsequent Confirmation There Is No Meeting of the Minds and No Contract.

By providing that the documents would be delivered, if the home office of the company permitted the sale, "when written confirmation will be made," Mr. Parkhurst advised the intending purchaser of the fact that he doubted his authority to sell, in view of the pending claims against the original buyers, who had rejected the goods "on the plea that the cargo was not up to specifications," as Mr. Shirek testified (Tr., p. 20). Until such written confirmation should be given, Mr. Parkhurst clearly intended that there should be no sale.

It is apparent, therefore, that the instrument is lacking in a vital element essential to the formation of a contract, namely, *the present, unconditional acceptance of the offer* of the purchaser to buy the goods. The rule, which is universally recognized, has been variously stated in the texts. It is said that the assent necessary to constitute a valid contract must be

"mutual and intended to bind both sides. *It must also co-exist at the same moment of time.* A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another and *the acceptance must be unconditional.*"

1 *Mechem on Sales*, Sec. 219, quoting *Benjamin on Sales*, Sec. 38.

"An acceptance, to be effectual, must be identical with the offer and *unconditional*. Where a

person offers to do a definite thing, and *another accepts conditionally* or introduces a new term into the acceptance, *his answer is either a mere expression of a willingness to treat* or it is a counter proposal, and in neither case is there an agreement."

13 C. J. 281.

The case at bar is exactly analogous to those cases where contracts entered into by agents or salesmen contain provisions for their approval by the home office of the company on whose behalf they are executed. In such case it has been uniformly held that the so-called contracts are not binding on either party until such approval is given and communicated to the other party.

In the case of *Holder v. Altman*, 169 U. S. 81, 42 L. Ed. 669, the Supreme Court of the United States had under consideration a contract between Holder, a resident of Michigan, and Altman, Miller & Co., an Ohio corporation, which had not complied with the laws of Michigan relating to foreign corporations. Under the Michigan law, all contracts made in Michigan by such foreign corporations were void. The contract in question contained the following provision: "This contract not valid unless countersigned by our manager at Lansing, Michigan, and approved at Akron, Ohio." The Supreme Court held that the contract, which had been signed by the company's agent in Laingsburgh, Michigan, and countersigned

by its manager at Lansing, Michigan, was not made in that State, but in Ohio, where the final approval was endorsed thereon, and said (169 U. S. 91) :

“The approval at the plaintiff’s home office was not a ratification by the plaintiff of an unauthorized act of one of its agents, for each of the agents . . . appears to have acted within the strict limits of his authority. But the final approval by the plaintiff itself was an act which, according to the express stipulation of the parties, and in the contemplation of every person who affixed his signature to the paper, was a necessary step to complete the execution of the instrument by the plaintiff, and to make it a valid and binding contract between the parties.”

So, in the instant case, “written confirmation” was a necessary step to make a valid and binding contract between the parties.

The case of *Waco Mill & Elevator Co. v. Allis-Chalmers Co.*, 49 Tex. Civ. App. 426, 109 S. W. 224, involved an alleged contract signed by the agent of Allis-Chalmers Company, containing the following provision: “This proposal is for immediate acceptance of the purchaser, and is subject to the written approval of the executive officer or general manager of sales of the company, and shall not be binding upon the company until so approved.” No such approval was ever given, and the Court, in holding that there was no contract, said (109 S. W. 227) :

“A contract with this provision in it means that it is merely a proposal, subject to approval, and

would only become binding upon the defendant when so approved. . . . If it be conceded that Everett had the authority to execute the instrument in question, it was not a binding contract until approved by the defendant, which the Court below finds was not the case."

In *Perkins v. Maurepas Milling Co.*, 88 Miss. 804; 40 So. 993, the instrument sued on recited that "This contract order is taken subject to approval of Grand Rapids Gas Engine & Yacht Co." In holding the complaint *fatally defective on demurrer*, for want of an allegation that such approval had been given, the Court said (40 So. 994):

"The consummation of the contract was dependent on an affirmative ratification by the appellant. . . . No right of any kind could possibly have accrued to appellee under the order here under review until it had reached the appellant and had received his approval. . . . It required the acceptance of the appellant to vitalize the order into a definite and enforceable contract."

To the same effect are the following cases:

Hart-Parr Co. v. Brockriede, 188 Pac. (Okl.)

113;

Whitman Agricultural Co. v. Hornbrook, 24

Ind. App. 255, 55 N. E. 502;

Huber Mfg. Co. v. Wagner, 167 Ind. 98, 78

N. E. 329;

Barnes Cycle Co. v. Schofield, 111 Ga. 880, 36

S. E. 965;

J. C. Lysle Milling Co. v. Rumph & Tyson,
203 S. W. (Ark.) 850.

It may be noted in passing that in the Lysle case, last cited, the instrument recited that "these goods are *sold* at price, on terms and time of shipment specified above," yet the Court unhesitatingly held that there was no contract of sale, because there was no approval of the order, which provided that it was subject to "*confirmation* by J. C. Lysle Milling Co. at their office in Leavenworth, Kan."

Where traveling salesmen or drummers take orders for their employers, it is always held that such orders, even though signed by the salesmen in the names of their principals, constitute mere offers to purchase on the part of the buyers, and that, until the orders are accepted by the sellers and such acceptance is communicated to the buyer, there is no contract and either party may withdraw.

"An order for the purchase of goods, given by the purchaser and signed by the seller's agent, which, by its terms, is subject to the acceptance and approval of the seller, is not a contract and if the seller does not accept such order, he incurs no liability thereon. Such order may be revoked by A at any time before B accepts it. A so-called contract which is entered into between A and B's agent X, which by its terms is not binding upon B until accepted by him, is in the meantime a mere offer on the part of A."

1 *Page on Contracts* (2d Ed.), pp. 292-3, and cases cited.

And the rule quoted applies to drummers generally, even though there is no express reservation of the right of approval by the principal, because of the universal recognition of the fact that their authority is limited to the taking of orders.

Baird v. Pratt, 148 Fed. 825;

Gould v. Cates Chair Co., 147 Ala. 629, 41 So. 675;

L. A. Becker Co. v. Alvey, 27 Ky. L. Rep. 832, 86 S. W. 974;

Reid v. Northwestern Implement & Wagon Co., 79 Minn. 369, 82 N. W. 672.

In the instant case, Mr. Parkhurst placed himself in the traveling salesman or drummer class by advising defendant in error, in the so-called contract, that he would have to find out from his home office whether or not the sale would be permitted, in which event "written confirmation" would be made. In the language of *Perkins v. Maurepas Milling Co.*, *supra*, it required such written confirmation "to vitalize the order into a definite and enforceable contract."

In the case at bar, the lower Court reversed its own previous ruling in the case of *Hsieh Po-Hsiang v. Shipper's Commercial Corporation*, 1 Extraterritorial Cases 1010, which involved a series of instruments, claimed to be contracts, each of which contained the following provision:

"We hereby confirm transaction consummated

with you today covering your purchase of the following, subject to the conditions stated on the back hereof and acceptance at Seattle office."

The lower Court, in holding that the petition was fatally defective on demurrer, for failure to allege such acceptance, said (1 Extraterritorial Cases 1011):

"The instruments of November 19 purport to be nothing more than 'confirmations'—i. e., acceptances of offers previously made—and in order that a contract may result, *the acceptance must be unconditional.*

As each of these instruments was '*subject to . . . acceptance at Seattle office,*' it would seem to follow that *no agreement could result at least until such acceptance was obtained.*" (Italics ours.)

"We hereby *confirm* transaction *consummated* with you today," is almost as strong language as "Getz Bros. & Co. of the Orient, Ltd., *have sold,*" and, standing by itself, it could only be construed as a recital of a completed transaction, yet the Court found no difficulty in deciding, and correctly deciding, that it was qualified by the clause "subject to acceptance." When this case was called to the attention of the Court on the argument of the demurrer in the case at bar, the Court held that the clause "if cable advice from home office permits sale . . . when written confirmation will be made" applied only to the delivery of the documents (Order Overruling Demurrer, Tr., pp. 12-14), and in its opinion and judgment, the Court elaborated on this view and said that

the instrument was a severable contract, a somewhat startling proposition which will now be discussed.

The Instrument Was Not a Severable Contract.

The opinion of the Court on this point reads as follows (Tr., pp. 52-4) :

“While only a part of it is pleaded and relied upon in the answer, counsel’s main reliance in argument is upon the following provision of the instrument sued on:

‘We agree to deliver documents on payment, if cable advice from our home office permits sale without suit against original buyers. Reply should be received approximate seven (7) days when written confirmation will be made.’

It will be seen that this does not, in terms, qualify the provisions above discussed and which in the instrument are separated from it by considerable other matter. The clause in question does not, in other words, provide, or even hint, that the sale and delivery of, or payment for, the goods are conditioned upon the receipt of ‘cable advice from our home office.’ On the contrary, ‘payment’ is assumed as something already fixed and upon it is conditioned the delivery, not of cargo—which had already been provided for absolutely—but of ‘documents.’ What these were we are left to conjecture, and no attempt was made to explain the ambiguity by evidence. If they were shipping papers they were clearly unnecessary, for delivering the goods for these, it is undisputed (p. 3), had been landed in Shanghai before the contract was signed.

It is evident, then, that we are here considering an independent provision, separate and distinct from the portion which recites the sale as a *fait*

accompli and provides for 'complete delivery and full payment' respecting the goods. *The instrument before us, in other words, evidences not an entire but a severable contract—i. e., it contains not only a memorandum of sale requiring 'complete delivery and full payment,' but also a distinct provision regarding unidentified documents.* Now it is one of the characteristics of a severable contract that one portion of it may be enforced even though there can be no recovery as to another and distinct portion. At most such would be the result of accepting counsel's contention here. If it were true that the provision relied upon and last quoted has not been complied with, that would not prevent recovery for the breach of the separate and distinct agreement to deliver the goods which defendant had 'sold,' and plaintiff had 'bought.'" (Italics ours.)

In our discussion of the form of the instrument, we have shown why the terms therein quoted by the Court are "separated . . . by considerable other matter"; but, apart from that consideration, the reasoning of the lower Court on this point is absolutely unsound. We have examined all of the texts and cases cited (Tr., p. 53) by the Court in support of its construction of the contract as severable, and find none where it is held that a provision in a contract for the sale of a single lot of goods is severable from the provision for the delivery of documents evidencing the passing of title. The instrument itself shows that the plate cuttings in question were "covered by drafts Nos. B. C. 4139," etc., and it may well be that the cuttings had been sold to the original buyers upon

bills of lading or shipping documents, accompanied by drafts against the original buyers, and that these drafts and documents were still held by the bank or banks through which the drafts had been negotiated. In such case it would be perfectly natural that the documents should be "delivered on payment," if the sale went through. Be that as it may, it is absurd to say that the goods were sold, irrespective of the approval of the home office, but that the documents were only to be delivered "if advice from home office permits *sale*." Manifestly, both parties regarded the delivery of the documents, whatever they were, as a necessary concomitant of the sale of the goods and the passing of the title, yet the Court, in effect, held that the sale itself, the vital element of the transaction, required no confirmation, while the mere incident to the sale, the delivery of the documents, required "cable advice from the home office." In other words, the Court held that the home office, though it might not permit, could not prevent, the sale, though it could forbid the delivery of the documents. It might "forbid the banns," but not the marriage! The proposition requires no further discussion.

**The Deposit of 900 Taels Did Not Make the Instrument An
Enforceable Contract.**

We would not deem it necessary to refer to this deposit had not the Court, in its opinion and judgment, said (Tr., pp. 50, 51):

“The document recites an executed contract of sale, not an offer to sell. *Had it been a mere offer defendant would hardly have accepted, and plaintiff would hardly have paid, \$900 (sic) of the price.*”

The language of the instrument is “Receipt of *deposit* 900.00 Taels is hereby acknowledged,” not “received payment of” or “received on account” 900.00 taels. There is nothing in this language to warrant the statement that this deposit was paid or accepted on account of the price, and under the rules of law above quoted there was nothing to prevent the defendant in error from drawing down this deposit at any time before written confirmation of the contract should have been made. When advising defendant in error that the sale would not be made, plaintiff in error returned this deposit by check, which was received by defendant in error and cashed (Tr., p. 24. Defendant’s Exhibit No. 1, Tr., p. 43).

The Use of the Word "Contract" in the Original Instrument and in the Letter of February 14 Was of No Significance.

In its opinion (Tr., p. 51) the lower Court adverted to the fact that the first sentence of the instrument recites that plaintiff in error had sold the goods "upon the terms and conditions as made herein, and on the reverse side of *this contract*," and also refers to the fact that

"in its letter (Ex. D) of February 14, 1922, eleven days after the instrument was signed, defendant expresses 'regret that we cannot carry out *our contract* with you.'"

We have shown that this instrument was a mere tentative offer, on a printed form, but even were such not the case, it is common knowledge that the expression "contract" is frequently used to designate an instrument itself, as distinguished from the assent and meeting of the minds which creates the contractual relation. Thus, in the case of *Holder v. Altman*, *supra*, the instrument read, "This *contract* not valid unless countersigned," etc. In *Waco Mill & Elevator Co. v. Allis-Chalmers Co.*, *supra*, the Court said, in the quotation cited on page 21 of this brief: "A *contract* with this provision in it means that it is merely a proposal." In *Perkins v. Maurepas Milling Co.*, *supra*, the instrument read, "This *contract* order is taken subject to approval." Yet in each case the Court held that there could be no contract—that is to say, no *contractual relation*—until approval by the

principal. This double use of the term is recognized in the texts.

“While the term ‘contract’ is sometimes used as meaning the writing by which the agreement is evidenced, the contract itself must not be confused with the instrument by which it is evidenced.”

13 *C. J.* 239.

It is manifest that the word as used in the instrument in question was used as a description of the instrument itself, for the very first word at the head of the instrument is the word “CONTRACT” in capital letters (*Tr.*, p. 3). And the quotation from the letter of February 14 (Plaintiff’s Exhibit “D,” *Tr.*, pp. 42-3) is hardly fair to plaintiff in error, because the first sentence of that letter states that:

“In compliance with our *memorandum* with you, we cabled to our home office on February 3d, as follows,” etc.,

and, in closing the letter, the writer said,

“Thanking you for the *offer*, we beg to remain,” etc.

When in the same letter the instrument was variously described as a “memorandum,” a “contract” and an offer,” how can it be said that a binding contract, in the strict legal sense, was admitted by the mere use of the word “contract,” when the letter as a whole is a rejection of the offer of defendant in error?

**The Answer Sufficiently Denies the Existence of a Contract and
Contains No Admission Thereof.**

Paragraph 2 of the answer is as follows (Tr., p. 16) :

“2. Answering paragraph two of said petition, defendant admits executing the document therein mentioned, a copy of which is attached to said petition, but denies that the same constituted a contract of sale between the parties hereto, by reason of the fact that the same was not confirmed by defendant’s home office as provided for in said document.”

Paragraph 6 of the answer is as follows (Tr., p. 16) :

“6. Further answering said petition, and by way of a further and separate defense, defendant alleges that if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties hereto.”

The trial Court in its opinion (Tr., pp. 50-51), after quoting paragraph 2 of the answer and discussing the effect of the words “have bought” and “have sold” in language already quoted in this brief, goes on to say (Tr., p. 51) :

“It is true that another portion of the document declares that ‘written confirmation will be made’ (not that it must be) ; but the context indicates that it applies to something else than the contract of sale, and if it were intended to apply to the latter it could have no effect upon a contract already

executed. Since no other reason is alleged for impugning the contract, we must regard this denial in paragraph 2 as insufficient."

(We have already discussed the reasoning of the first sentence just quoted. The defendant, having been compelled to answer, could not deny the *execution* of the instrument, but had of necessity to deny the *legal effect* thereof, as it did in appropriate language in paragraph 2 above quoted.)

Continuing, the Court said (Tr., p. 51):

"That counsel himself so regarded it, seems indicated by the subsequent averment, 'if any contract existed between the parties hereto, as alleged by plaintiff in this petition, that the same has been cancelled by mutual consent of the parties' (paragraph 6).

Not only is no proof of cancellation offered, but the averment itself seems a qualified admission that there was a contract, and, therefore, nullifies the denial."

In support of the statement last quoted, the Court cites the cases of *Veasey v. Humphreys*, 27 Or. 515, 41 Pac. 8, and *Derby v. Gallup*, 5 Minn. 119, neither of which is in point or supports the conclusion of the Court. In the first place, the matter in paragraph 6 of the answer is set forth as a "further and separate defense"; and, in the second place, the conditional phrase "if any contract existed" is at most a qualified admission of a conclusion of law, not of the existence of a fact.

The case of *Veasey v. Humphreys*, *supra*, merely held that a defendant in an action for conversion could not deny the execution of a chattel mortgage in one defense, and admit it in a defense of confession and avoidance, and, in that case, in discussing the pleading of inconsistent defenses, the Court expressly recognized that it is good pleading at common law, in an action against a discharged bankrupt, for instance, for him to deny the execution of a contract in one defense and to plead his discharge in bankruptcy in another, in substantially the following form, "after the making of the said supposed contracts, he became a bankrupt," etc. Such inconsistent defenses the Court held not to constitute admissions of the matter denied.

In the case of *Derby v. Gallup*, 5 Minn. 119, it was held that, in an action for conversion of goods, a defendant could not deny a taking in one defense and admit it in a plea of confession and avoidance, *under the code of Minnesota*, although under the common law such pleading was sometimes permitted.

**The Offer of Plaintiff in Error to Sell 50 Tons of Cuttings Was a
New Offer and Not a Recognition of the So-called Contract.**

On February 20, 1922, plaintiff in error addressed to the attorney for defendant in error the following letter (Plaintiff's Exhibit "A," Tr., pp. 39-40):

"Head office

San Francisco, U. S. A.

Getz Bros. & Co. of the Orient, Ltd.

Incorporated

Exporters and Importers

Whiteaway, Laidlaw Bldg.,

Nanking Road Cor. Szechuen.

Shanghai, China, February 20th, 1922.

Mr. F. J. Schuhl,

112 Szechuen Road,

Shanghai.

Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately *fifty (50) tons of Plate Cuttings* that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept this offer.

Yours truly,

Getz Bros. & Co. of the Orient, Ltd.,

By T. L. Parkhurst,

Manager."

TLP—RA

(Italics ours.)

The lower Court, referring to this letter, says (Tr., p. 52) :

“It is undisputed that this lot was a part of the original cargo forming the subject matter of the sale which defendant not only does not question, but appears to recognize in this letter. Surely it would seem to be estopped from denying that there was a contract. Clearly, also, authorities are not in point which construe mere conditional offers.”

We fail to find in the letter quoted any language which “recognizes” the sale, or makes any reference thereto. It mentions a different amount of goods, 50 tons as against 370 tons, to be taken “by Wednesday,” which was February 22d, whereas the original instrument called for delivery and payment “on or before February 28th” (Tr., p. 3). We deem it unnecessary to discuss the elementary proposition that such a proposal, differing so vitally from the original proposition which had already been rejected, is a mere counter offer, and neither created nor recognized a sale on any terms. Authorities on this point could be cited *ad libitum*. We note the following:

13 *C. J.* 281, 282;

6 *R. C. L.* 608;

1 *Page on Contracts* (2d ed.), Sec. 137;

1 *Elliott on Contracts*, Sec. 38;

1 *Williston on Contracts*, Sec. 77.

The Reasons for the Rejection of the Offer and the Subsequent Disposition of the Goods Are Matters Wholly Immaterial to the Case.

The Court, in closing its opinion, laid considerable stress upon the fact that no cable advice forbidding the sale was produced at the trial, that no suit was brought against the original purchaser, and that the goods were subsequently sold to others. We concede these facts, but respectfully submit that they are wholly immaterial. We have shown that no contract was entered into, because there was no "written confirmation" of the proposal contained in the instrument. It may be that the Court below felt that the real reason for the failure of plaintiff in error to consummate the transaction was a rise in the price of the goods, but that fact, if it was a fact, did not authorize the Court to make a contract for the parties where none was shown to have been made. In the case of *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675, which involved an order taken by a salesman and rejected by his principal, when it was suggested that the reason for the rejection was a rise in price of the goods, the Court said (41 So. 677) :

"Having the right to decline acceptance of the order, it would be a matter of no importance upon what ground the declination was placed or whether any ground was stated."

In the case of *Kleinhans v. Jones*, 68 Fed. 742, it was held that the reason for the rejection of an offer was immaterial. The Circuit Court of Appeals for the Sixth Circuit, Judges Taft, Lurton and Severens presiding, there said through Judge Severens (68 Fed. 748-9) :

“While it may be—and we think it quite probable that such would have been the result—that Jones would not have objected to the variations from the first offer contained in the second, which was accepted by Pope, but for the intervention of other parties, and the prospect of obtaining a larger purchase price by disavowing the act of Pope, yet we are not at liberty to act upon any conjecture as to whether Jones would have ratified Pope’s act, whether or not the new parties had come into the field. In the first place, a court of equity has no power to enforce the specific performance of a contract which is not already established between the parties; and *in order to give ground for the action of the Court, it must be made clearly to appear that a definite and binding legal contract exists.*”

(Italics ours.)

Having made no contract, plaintiff in error was at liberty to sue, or to refrain from suing, the original purchasers, and to sell the goods to any person for any price it chose to accept, and these matters, being all *res inter alios acta*, and occurring after the rejection of the proposed sale, had no evidentiary value and created no estoppel.

For the reasons above stated, we respectfully submit

that the judgment of the lower Court should be reversed.

CHARLES W. SLACK and
EDGAR T. ZOOK,
Attorneys for Plaintiff in Error.

No. 4079

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GETZ BROS. & CO. OF THE ORIENT, LIMITED,
Plaintiff in Error,

vs.

H. M. SHIREK, doing business under the
name and style of THE MERCHANDISE
BROKERAGE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

WARREN GREGORY,
ALLEN L. CHICKERING,
EVAN WILLIAMS,
DONALD Y. LAMONT,
SCHUHL & SCHOENFELD,
Attorneys for Defendant in Error.

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Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Although the record is quite brief, it may assist the Court if we first present in chronological order the communications between the parties which took place after the contract was signed.

This contract is dated February 3, 1922, and on the same day the Manager of the Shanghai Branch of the plaintiff in error cabled his home office as follows:

“Re Plate Cuttings stock—We understand legally must sue buyers before selling.”

We draw attention to the fact that this cable did not mention the contract in question or seek any

confirmation thereof. On February 14, plaintiff in error (hereafter called Getz Bros.) wrote defendant in error (hereafter called Shirek) as follows:

“Dear Sirs:

In compliance with our memorandum with you, we cabled to our Home Office on February 3d, as follows:

‘Re Plate Cuttings stock—We understand legally must sue buyers before selling.’

We have now received a reply from our Home Office dated February 7th, 1922, in which they refer to our message and advise us to take legal proceedings.

Under these circumstances, the cargo has been turned over to our Compradore, who we will hold for decision of arbitration as to the reliability of the original purchaser.

We regret that we cannot carry out our contract with you and are returning attached our check No. 705 for Taels 900.00 (Nine Hundred) to cover the deposit which you made with us.

Thanking you for the offer, we beg to remain,

Yours very truly,

Getz Bros. & Co. of the Orient, Ltd.

By T. L. Parkhurst,

Manager.”

On February 16 the attorney for Shirek wrote Getz Bros. as follows:

“Dear Sirs:

Your letter of the 14th instant addressed to the Merchandise Brokerage Co. has been turned over to the writer for reply. I would like to have a definite answer from you as to whether or not you intend to deliver to my client 370 tons of steel plate cuttings under the terms of your contract dated February 3d. My client

feels that they are entitled to the delivery of this plate.

Yours very truly",

On February 20, Getz Bros. wrote the attorney for Shirek as follows:

"Dear Sir:

Re: Merchandise Brokerage Co.

We acknowledge your favor of February 16th, 1922, and beg to advise that we have been holding for the above (plaintiff) approximately fifty (50) tons of Plate Cuttings that were shipped for our stock.

If they care to avail themselves of this material, it would be necessary for them to take up the cargo by Wednesday by 11 o'clock, otherwise we will consider that they will not accept this offer.

Yours truly,
Getz Bros. & Co. of the Orient, Ltd.
By T. L. Parkhurst,
Manager."

On February 21 the attorney for Shirek wrote Getz Bros. as follows:

"Dear Sirs:

Re: Merchandise Brokerage Co.

I have your kind favor of the 20th instant and beg to say that my clients are willing to accept the fifty tons of plate cuttings mentioned in your letter providing however you agree to deliver the balance of the cargo under the contract within 48 hours. My client feels that they are entitled to the entire lot 370 tons and unless the cargo is delivered, I will be compelled to institute proceedings for damages.

Yours very truly,"

These letters with the contract are the only written documents which passed between the parties or were executed by them. No evidence of any advices from the Home Office of Getz Bros. to their Shanghai Branch was produced other than the alleged copy of the cable contained in the letter of February 14. The original of this cable was not produced and Getz Bros. refused to show it to Shirek (p. 19, also 22). The evidence of the cable as contained in the letter is, therefore, hearsay and not the best evidence, since the original cable was in the possession of Getz Bros. at Shanghai, and the terms of the communication could be shown only by such cable.

The only evidence other than writings and other than that dealing with the amount of the damages suffered is in brief that Parkhurst, the manager of Getz Bros. in Shanghai, told Shirek about February 12th or 13th that he had received a cable from his Home Office, which cable he refused to exhibit; that Getz Bros. did not proceed legally against the original buyers of the cargo, but sold it to a different party (p. 19). There is no evidence as to who these original purchasers were. *The only evidence produced for Getz Bros.* was the testimony of the two expert witnesses, Angus and Reeves as to the market price of the goods and upon the subject of damages. It is significant that Parkhurst was not called.

It is evident, therefore, that the only question which is now before this Court is as to whether or

not *any* contract between the parties ever existed. The document at least *prima facie* purports to be an agreement binding upon both parties for the sale and delivery of certain specifically described merchandise. The subject matter was at that time in Shanghai and is clearly identified. The price and terms of payment also specifically appear. The document is termed in many provisions "a *contract*", and the general language is that the seller "has sold" and the buyer "has bought". Counsel has argued at some length that this document was evidently written upon a stock form, with the exception of the clause which it is claimed negatives the contract and the argument is made that, therefore, more weight should be given to this clause than to the remainder of the contract. The original document was not before the Court and there is no evidence as to the character of any portion of such document. It must, therefore, be a matter of surmise only as to what portion, if any, of the document was especially prepared, but the significant fact is that it *was prepared by Getz Bros.* It is headed (p. 3) in large type "Contract. Getz Bros. & Co., of the Orient, Ltd.".

I.

Argument.

ANY AMBIGUITIES IN THE CONTRACT MUST BE CONSTRUED AGAINST GETZ BROS. BECAUSE THEY PREPARED IT.

It has been said that the reason for this rule is that a man is responsible for ambiguities in his own

expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage. In

Bijur Motor Lighting Co. v. Eclipse Co., 237
Fed. 89,

the Court said:

“* * * The formal opening words, ‘Memorandum of Agreement Reached July 9, 1914, Between the Bijur Motor Lighting Company and Victor Bendix’, and the protracted meetings and negotiations before an understanding was reached, make applicable the general rule of strict construction, which requires resolving any doubt as to the true meaning and construction of any of the provisions against the complainant, at whose instigation the parties met for the purpose of reaching an agreement, and by whom or under whose supervision it was prepared or drawn. *Wilson v. Cooper et al.* (C. C.) 95 Fed. 625; *Van Zandt v. Hanover Nat. Bank*, 149 Fed. 127, 79 C. C. A. 23; *Christian v. First Nat. Bank of Deadwood, S. D.*, 155 Fed. 705, 84 C. C. A. 53.”

Wilson v. Cooper, 95 Fed. 625, 628.

In

Marx v. Am. Malting Co., 169 Fed. 582,

it was held that the fundamental rule in the interpretation of agreements was to ascertain the *prime object* and *purpose* of the parties, and “in case of ambiguity produced by its minor provisions, the latter should be construed so as not to conflict with the main purpose”, also

“another reason for adopting a more harmless meaning to this language than one which would defeat the main purpose is that the instrument was prepared by the vendor, and the rule is that in case of doubt or ambiguity arising from the use of words they should be construed most favorably to the other party”.

II.

**THE PARTIES INTENDED TO MAKE A BINDING CONTRACT.
AND IT IS IMMATERIAL WHETHER THAT CONTRACT WAS
FOR AN EXECUTORY OR AN EXECUTED SALE.**

This subject and others discussed by counsel for Getz Bros. were considered by the learned trial Court in two opinions rendered by him, one upon a demurrer to the complaint (pp. 12-14) and the second when judgment was rendered (pp. 49-57). We request this Court to read these two opinions as we shall not, in this brief, attempt to retraverse the same ground.

It is urged that the use of the words “have sold” and “have bought” have not the controlling effect given them by the lower Court, and that these words may be used, and still, in certain cases, the agreement be executory. We do not find in the opinions of the trial Court anything to the contrary. It is sufficient to adopt the conclusion that these words *prima facie* indicate the intention to consummate an executed contract and to pass title to the goods *Chenault v. Mauer Co.*, 154 Pac. Rep. 507). It requires no citation of authorities to uphold this view,

and the authorities cited by opposing counsel say nothing to the contrary. Of these cases the Elgee Cotton cases, 22 Wallace 180, may be taken as a type. In these cases and, we think in all the cases cited by counsel in this regard, the subject matter of the sale was not in a position for immediate delivery, but some acts had still to be done by the seller in order to put them in a deliverable state. The contracts thus required certain conditions precedent to be performed by the seller and the Courts held that even though the words "bought" and "sold" were used, still it was obvious from a consideration of the whole contract that the acts remaining to be done by the seller made it impossible to pass an immediate title. In such case the contract was construed as an agreement to sell and not an executed sale.

But in the instant case nothing remained for the seller to do as concerns the goods. The contract and the evidence show that the plate cuttings in question were all in the stock of Getz Bros. at Shanghai. The subject matter was made definite as well as the time for the delivery of the full payment. The numerous conditions which were made a part of the contract almost entirely deal with goods which are en route. They cannot control this contract one way or the other since the goods were already in Shanghai when the contract was made.

It should here be noted that this distinction between an executed and executory contract has no

significance when applied to the facts in this case, as Getz Bros. would if liable at all be liable in either case. The complaint simply alleges that on February 3, 1922, the parties entered into a written contract for the sale of 370 tons of plate cuttings. A copy of the contract was attached to the complaint. Such allegation would have permitted the plaintiff below to have recovered under either construction of the contract. The execution of the document is admitted in the answer (p. 16), the only denial being that it did not constitute a contract of sale by reason of the fact "that the same was not confirmed by defendant's Home Office as provided for in said document". Plaintiff in error, therefore, must now satisfy the Court that no contractual relationship of any kind arose between the parties, and that in legal effect, the result is now the same as if Getz Bros. had never signed the contract or agreed to it. They must construe this contract or document as a mere offer to buy without imposing any obligation upon the seller, so that the seller could have revoked it at any time thereafter, for if it be now claimed that this was even for a moment a "contract" coupled with the condition that it must be confirmed by the Home Office, it at least imposed upon seller's representative in Shanghai the duty of requesting such confirmation from the Home Office. As will be shown hereafter, no such request was made.

The conclusion that this formal document coupled with a deposit of part of the purchase price and

specifically binding upon the *buyer* did not impose any obligations on the part of the *seller*, does violence to the plain general intent or purpose of the agreement. The trial Court held that the particular clause in question, and upon which reliance is now made to show that there was no meeting of minds, was at best a collateral or incidental feature of the contract which would not control its main intent, and that there was an obligation intended to be imposed upon both parties thereby. As already stated the substantive parts of the document show an unequivocal intention to then create a *contract* of sale which would be binding upon both parties, and the burden of showing that any condition negatives this intent must rest upon the party who seeks to avoid the effects of the contract. It must be a condition which is clear and unequivocal. If it be doubtful or ambiguous then such doubt or ambiguity must have been cleared by competent evidence. We submit that defendant in error might well rest his argument upon the simple statement that the clause in question is ambiguous if to be given the force now claimed for it, and that since this ambiguity was in no wise explained, the clause must be disregarded. If there be any possible construction of the clause which will fit in with the main intent and purpose of the contract, and which in this case is obvious, such construction must be adopted by the Court.

2 *Page on Contracts*, section 1122;

Rothrock v. Hunter, 119 Pac. Rep. 1114.

III.

**THIS CONTRACT DID NOT REQUIRE CONFIRMATION
BY THE HOME OFFICE.**

For convenience we restate the particular clause in question:

“Receipt of deposit Tails 900.00 is hereby acknowledged and we agree to deliver documents on payment, if cable advice from our Home Office permits sale without suit against original buyers. Reply should be receive approximate seven (7) days when written confirmation will be made.

Approved by seller,
Getz Bros. & Co., of the Orient, Ltd.
(Signed) By T. L. Parkhurst,
Manager.”

As noted in the opinion of the trial Court this condition “and we agree to deliver *documents* on payment”, does not, at least on the surface, mean anything more than the seller might withhold the possession of any *documents*, but it does not state that they will not deliver the *goods*. What documents were meant is not disclosed. No evidence on the subject was introduced, although the plaintiff in error relies upon this condition to negative the otherwise clear provisions of the contract. The duty assuredly devolved upon him to show what these documents were and what relation they had to the delivery of the goods or title thereto. As the case now stands no one can say what documents were intended to be delivered on payment. All that legitimately may be inferred is that there were

certain documents which the seller might wish to retain *notwithstanding it accepted full payment for the goods, and delivered them*. Why it wished to retain these documents we do not know, other than the fact that they were considered important in a possible suit against third parties.

There is another, however, and even more fundamental answer to the contention here made for the plaintiff in error. The condition in question did not provide for any confirmation of this particular sale. It dealt only with the retention or delivery of certain documents, and that this is so is conclusively shown by the subsequent conduct of the seller for the only communication which Getz Bros. claims its Shanghai representative made to the Home Office was the cable:

“Re Plate Cuttings stock—We understand legally must sue buyers before selling.”

As already noted there is here no mention of the fact of the sale to Shirek, *nor is any request* made upon the Home Office for advices. If the contract is as claimed by counsel, viz., that the parties intended that the contract should not go into effect until the Home Office had confirmed it in writing, or at least had sanctioned it without suit against the original buyers, then assuredly the Shanghai representative would have sent a cable containing the necessary information and requesting advice.

The fact that the telegram was sent as above shows that the Shanghai representative at least did

not at that time, give to this clause in the contract the force that is now claimed for it because this would involve the absurdity that in the contract he said that it would depend for its consummation upon advice from the Home Office as to whether or not the sale could be made without a suit against original buyers. and on the same day he cabled, not for any advice from the Home Office, *but simply his view that they must first sue the original buyers.* He asked for no reply. Now if he was then of the opinion expressed in the cable which he sent, he knew when he made the contract that it was necessary to proceed against the original buyers. This construction, therefore, must place Getz Bros. in the position that they knew at the time when the contract was entered into, that it was not binding upon them because they already knew that the suit should be brought before the sale was made. It is not to be presumed that they would have accepted the deposit in question under such circumstances.

The authorities cited to the effect that orders which are taken by drummers or other like agents and which state upon their face that they are subject to confirmation by the Home Office, have no application to this case. Not only does this contract not so state, but it never was referred to the Home Office for confirmation and no confirmation of this or any other contract was asked for.

If we assume that the answer to the cable is correctly set forth in the letter of February 14 in which it was said:

“We have now received a reply from our Home Office dated February 7, 1922, in which they refer to our message and advise us to take legal proceedings”,

there is not the faintest intimation in this reply that the Home Office affirms or disaffirms the sale to Shirek. Obviously they could not have so stated because the Home Office knew nothing of the contract nor does the reply advise that the Home Office agrees with the understanding of their representative as expressed in his cable to them. He was simply *advised* to take legal proceedings, but whether or not this was intended to meanwhile hold up the sale to others, cannot be determined.

It will require the citation of no authorities to demonstrate that a seller does not lose his legal rights against a buyer, if such buyer has refused to accept the goods, and the seller then sells them to others. Not only does such resale not prejudice the seller in obtaining his rights against the first buyer, but the establishment of his damage through the medium of a re-sale is one of the most common remedies followed.

Pabst Brewing Co. v. E. Clemens Horst Co.,
229 Fed. 913.

It surely, therefore, cannot be *assumed* that any condition was inserted in this contract which would run directly counter to one of the most elementary legal principles governing the law of sales. It must be held that the parties did not intend by this clause to negative the other terms of the contract, and that

it dealt simply with the question of delivery of certain documents. The seller, at least, therefore, did not intend, by the insertion of this clause, to compel a confirmation from the Home Office before there was any contractual relationship established. If the communication which he did send was an expression of what he assumed his duty to be in order to carry out the terms of this clause, then it is clear that he thought that no confirmation was required. Indeed, Getz Bros. to uphold the position now taken must claim that there was no duty upon the part of the Shanghai representative to communicate with the Home Office at all; that he was under no obligation to even notify them that their consent was required. He had it within his power to deprive the contract of any force by simply doing nothing, altho meanwhile the buyer was bound and must assume all the risk of changing market conditions. Not only is such a conclusion opposed to the ordinary conclusion following the execution of a formal document such as this, but it is opposed to any principle of fair dealing.

This subsequent conduct of the parties may be looked to for the purpose of clearing up any ambiguity that there may be in the contract and is one of the most important rules in the interpretation of contracts.

Topliff v. id., 122 U. S. 121 at page 131;
Ins. Co. v. Dutcher, 95 U. S. 269 at page 273;
Nelson v. Ohio Cultivator Co., 188 Fed. 620
at page 624.

If the clause in question be given the force now claimed for it by plaintiff in error, viz., that advices from the Home Office were a condition precedent to the making of any contract between the parties, it is obvious that there must be an unusual and inequitable result such as parties would not ordinarily contemplate. It would mean that the seller, without any obligation on its part, had a binding contract against the buyer which it could enforce at any time on or before February 28th by simply "permitting the sale without suit against the original buyers". This "permission" was optional with seller. It also had a substantial deposit which it could bank or use in the interim. The testimony shows that the market for the goods in question was subject to rapid and radical changes. Under these circumstances the court should be disinclined to construe this stipulation so as to reach the above inequitable result.

Lucy v. Davis, 163 Cal. 611.

This rule of construction is particularly applicable where as here the obtaining of a third party's consent is claimed to have been a condition precedent. Thus in

Antonelle v. Lumber Co., 140 Cal. 309,

the contract provided that the defendant would pay to the plaintiff the remainder of certain funds, provided that the plaintiff, before that time, had obtained the written consent of a third party. The court said at page 315:

"* * * Assuming that the stipulation on the part of the plaintiff to obtain Antonelle's

consent was a condition precedent, it is well settled that such conditions are not favored by the law, and are to be strictly construed against one seeking to avail himself of them. (*Front-Street R. R. Co. v. Butler*, 50 Cal. 577; *Deacon v. Blodgett*, 111 Cal. 418.) More particularly does this follow, when a strict construction of such condition would work a forfeiture; a result which the law will always endeavor to prevent.

“Equally is it true, that a party will not be permitted to insist on the performance of a condition precedent when, by his own act, or a departure from the terms of the contract, it is found he has prevented the performance of such condition. (1 Wharton on Contracts, secs. 312-603; *Hawley v. Keeler*, 53 N. Y. 121; *Houghton v. Steele*, 58 Cal. 421.)”

The last portion of this quotation is particularly applicable to the instant case since the omission of the Shanghai representative obviously prevented any performance of the condition requiring the consent of the Home Office.

See also 13 *Corpus Juris*, p. 569, and cases cited.

The case of *Victoria S. S. Co. v. Western Assurance Co.*, 167 Cal. 348, is instructive in this regard. There a covering agreement for a contract of insurance had been made which provided among other things that the insurance should be subject to the satisfactory survey and loading certificate of the Surveyor of the Board of Marine Underwriters of San Francisco at the port of loading. It was claimed that this contract did not take effect until

the agents of the defendant in San Francisco had been given at least an opportunity of stating whether or not the survey and loading certificate were "satisfactory". The record shows that the certificate was never exhibited to or approved by the agent of the defendant in San Francisco. Nevertheless the contract was sustained upon the ground that under all the facts in the case it could not reasonably be held that the condition named was intended to be a condition precedent.

We, therefore, contend that the parties did not intend by the use of the clause in question, to provide that the contract should have no binding effect unless confirmed by the Home Office. Further, and in any event, that this was a collateral and minor feature of the contract with which Shirek was not concerned, since it referred only to the rights of Getz Bros. as against third parties.

IV.

THE CLAUSE IN QUESTION WOULD NOT CONTROL THE ENTIRE CONTRACT.

This clause is not written in such way as ordinarily would be done if the parties intended that their entire agreement should be subject to a written confirmation from the Home Office. It is not of the character of such conditions as appears in the cases cited in this connection for plaintiff in error. To the contrary it appears only in that portion of the

contract acknowledging the receipt of the deposit money of Taels 900.00. The language is:

“Receipt of deposit Taels 900.00 is hereby acknowledged, *and* we hereby agree to deliver documents, etc.”

The ordinary and grammatical construction which should be given to this clause, therefore, is that it simply relates to the deposit money. This also emphasises the view taken by the trial Court and heretofore expressed in this brief to the effect that any other interpretation would be to defeat the prime object and purpose of the parties as otherwise expressed in the contract.

Marx v. American Malting Co., 169 Fed. 582, *supra*.

V.

THE SUBSEQUENT OFFER OF SELLER TO DELIVER FIFTY TONS OF CUTTINGS WAS A RECOGNITION OF THE CONTRACT, AND PLAINTIFF IN ERROR IS ESTOPPED FROM NOW DISPUTING IT.

Under date of February 20, Getz Bros. wrote the attorney for Shirek stating:

“We acknowledge receipt of your favor of February 16, 1922, and beg to advise that *we have been* holding for the above approximately 50 tons of plate cuttings that were shipped for our stock. If they care to avail themselves of this material it will be necessary” etc.

It is said that this amounted merely to a new offer and was not a recognition of the so-called contract,

to which we reply that the letter can have no meaning other than by a reference to such original contract and an affirmation of it. There is here stated no price or terms upon which the 50 tons were to be delivered. It is only by incorporating the letter into the contract that this subsequent offer is made complete or intelligible. The language, "we have been holding for the above" is not the same as, "we now offer to sell, etc.". To the contrary it expressly states that the seller "has been" holding these 50 tons for the buyer. Such holding could have been done only under the contract and this letter, therefore, is a ratification thereof. It was written some time after the alleged cable had been received from the Home Office.

This letter further discloses that the seller had then abandoned whatever previous views he had had concerning the necessity of first suing the original buyers before any sale could be made to Shirek or that he considered essential any advice from his Home Office, for the 50 tons in question were part and parcel of the original stock, and if the seller thought it necessary to bring a suit against the original buyers, such action would apply to the 50 tons as well as to any other portion of the subject matter of the sale. It is admitted that the seller had not commenced any such action, and it, therefore, is an absurdity to say that this alleged necessity of suing the original buyers was fairly considered a condition precedent to the sale or was intended so to be. To this letter of February 20th,

the buyer's attorney on the next day (p. 41) replied stating that his clients were willing to accept said 50 tons, providing that the balance of the cargo would be delivered in forty-eight hours. No reply appears to have been made to this last communication.

The matter stands, therefore, as if the seller had, on February 3rd, when he wrote that he could not carry out the contract, written that he was willing to deliver 50 tons of the cargo under the contract, but no more. Such letter would unequivocally have been a recognition of the validity of the contract as a whole.

VI.

THERE WAS A DUTY ON THE PART OF THE SELLER TO AT LEAST HAVE SUBMITTED THE CONTRACT TO THE HOME OFFICE FOR ITS ACTION.

Reid v. Humber, 49 Ga. 207.

In such case the principal and not the agent is liable.

Mecham on Agency, Sec. 1479.

The cases cited of orders secured by drummers deal with *unilateral* contracts in which nothing is said as to whether or not the order will ever be presented to the Home Office for confirmation. The orders were signed only by the *buyer*. But in the present case the document, whatever its legal effect, was executed by both parties, the answer admitting

that it was executed by the seller. The clause states, "reply should be received approximately 7 days, when written confirmation *will* be made". A fair reading of this clause can convey no other impression than that the seller agreed to submit the contract to the Home Office so that it could be ascertained whether or not such Home Office "promised sale". The word "sale" here, of course, refers to this particular sale to Shirek and not to sales generally.

As heretofore noted the Shanghai representative did not refer the contract in question or the facts of the sale in question to the Home Office at all. The breach of this obligation on its part may be considered as justifying a recovery by the buyer even although the extreme view be taken that the parties did not, by this document, intend that there should be an immediate meeting of minds, except on this one point of the necessity of communicating with the Home Office. It should here be noted that no question of the authority of Parkhurst to fully represent the seller is involved. The admission in the answer is sufficient in that regard. It must be assumed that Parkhurst had the authority so far as his principal was concerned to have agreed to an immediate sale and delivery without reference to the Home Office.

If an agent takes an order, and having authority so to do receives a deposit from the buyer, and in

consideration thereof expressly or impliedly agrees to submit the order to his Home Office, then if he does not comply with this obligation, his principal is liable in damages, for at least to this extent there is an admitted breach.

VII.

THE OPINION OF THE TRIAL COURT (pp. 52-53) CONSIDERS IN ONE ASPECT OF THE CASE THAT THE CLAUSE IN QUESTION IS AN INDEPENDENT PROVISION SEPARATE AND DISTINCT FROM THOSE PROVISIONS WHICH PROVIDE FOR AN IMMEDIATE SALE, AND THAT IN A SEVERABLE CONTRACT SUCH AS THIS, ONE PORTION MAY BE ENFORCED EVEN THOUGH THERE CAN BE NO RECOVERY AS TO ANOTHER AND DISTINCT PORTION.

This statement is but another aspect of the same position, viz., that a special provision of this character should not render nugatory the obvious main intent and purpose of the contract if *any* construction may be given thereto which would avoid such result. To the effect that a failure to comply with minor or non-essential details does not make the entire contract unenforcible, see in addition to the authorities cited by the trial Court,

Spiritusfabriek Astra of Amsterdam v. Sugar Products Co., 163 N. Y. S. 516;

Ramot v. Scotenfels, 15 Iowa 457,

and that a construction which will render the contract valid will be preferred to one which makes it

void or its performance impossible or meaningless
see

Williston on Contracts, Sec. 620 and cases
cited.

Dated, San Francisco,
October 29, 1923.

WARREN GREGORY,
ALLEN L. CHICKERING,
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DONALD Y. LAMONT,
SCHUHL & SCHOENFELD,
Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,
vs.
NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

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the Western District of Washington, Northern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7138.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

*Page-number appearing at foot of page of original certified Transcript of Record.

Complaint.

Now comes the United States of America, by Thomas P. Revelle, United States Attorney for the Western District of Washington and brings this action on behalf of the United States against the Northern Pacific Railway Company, a corporation organized and doing business under the laws of the State of Wisconsin, and having an office and place of business at Seattle, in the State of Washington; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

[2]

FOR A FIRST CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and requirements of Section 3 of said Act, said defendant, on August 31, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 67219.

Plaintiff further alleges that on said date said defendant used or hauled said car as aforesaid over its line of railroad, from Auburn, in the State of

Washington, in a southerly direction, within the jurisdiction of this court, when the handhold on the right-hand side of the "B" end of said car was bent in against car, and when said car was not equipped with end handholds, one near each side of each end of car on face of endsill, with a minimum clearance of two inches, in accordance with the standards of equipment prescribed by said order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [3]

FOR A SECOND CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act Approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 61585, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of

railroad from Auburn, in the State of Washington, in a southerly direction, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the uncoupling lever being missing from the said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [4]

FOR A THIRD CAUSE OF ACTION plaintiff alleges that defendant is, and was during all times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, Approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its

own flat No. 68327, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the uncoupling lever being missing from said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [5]

FOR A FOURTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 66150, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the hand brake on said car was inefficient, the hand brake wheel being fouled by the lading thereon, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [6]

FOR A FIFTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 61611, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the hand brake on said car was out of repair and inefficient, the hand brake shaft being bent, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [7]

FOR A SIXTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 63242, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the hand brake on said car was out of repair and inefficient, the hand brake shaft being bent, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [8]

FOR A SEVENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier en-

gaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and requirements of Section 3 of said Act, said defendant, on August 31, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 68347.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the handhold was missing from the right-hand end of the side of car near the "A" end thereof, and when said car was not equipped with side handholds, one on face of each side-sill near each end, in accordance with the standards of equipment prescribed by said Order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of One Hundred Dollars. [9]

FOR AN EIGHTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier en-

engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 67105, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the hand brake on said car was out of repair and inefficient, the hand brake wheel being missing, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [10]

FOR A NINTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and re-

quirements of Section 3 of said Act, said defendant, on August 31, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 64764.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the handholds were missing from the right and left hand ends of the sides of car near the "B" end thereof, and when said car was not equipped with side handholds, one on face of each side-sill near each end, in accordance with the standards of equipment prescribed by said Order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [11]

FOR A TENTH CAUSE OF ACTION plaintiff alleges that said defendant is and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the state of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and re-

quirements of Section 3 of said Act, said defendant, on August 31, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own *coal* No. 58618.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Auburn, in the State of Washington, in a southerly direction, within the jurisdiction of this court, when the second tread from top of the side ladder near the "B" end of said car was bent, and when said car was not equipped with ladders, one on each side, with a minimum clearance of two inches, in accordance with the standards of equipment prescribed by said Order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [12]

FOR AN ELEVENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and re-

quirements of Section 3 of said Act, said defendant, on August 31, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 67399.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the handhold on the right-hand end of the side of car near the "B" end thereof was bent, and when said car was not equipped with side handholds, one on face of each side-sill near each end, with a minimum clearance of two inches, in accordance with the standards of equipment prescribed by said Order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [13]

FOR A TWELFTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on August 31, 1922, hauled on its line of railroad one car, to wit: its own flat No. 65296, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Auburn, in the State of Washington, in a northerly direction, within the jurisdiction of this court, when the hand brake on said car was out of repair and inefficient, the hand brake shaft being bent, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [14]

FOR A THIRTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and requirements of Section 3 of said Act, said defendant, on September 2, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 61753.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Centralia, in the State of Washington, in a northerly direction, within the

jurisdiction of this court, when the handhold on the right-hand side of the "A" end of said car was fouled by the lading thereon, and when said car was not equipped with end handholds, one near each side of each end of car on face of end-sill, in accordance with the standards of equipment prescribed by said order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [15]

FOR A FOURTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), and an Order of the Interstate Commerce Commission of March 13, 1911, prescribing standards of equipment, which order was made pursuant to the provisions and requirements of Section 3 of said Act, said defendant, on September 2, 1922, hauled or used on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: its own flat No. 64036.

Plaintiff further alleges that on said date said defendant hauled or used said car as aforesaid over its line of railroad, from Centralia, in the State of Washington, toward South Bend, in said State,

within the jurisdiction of this court, when the sill step on the left-hand end of the side of the car near the "A" end thereof was broken, and when said car was not equipped with sill steps, one near each end on each side of car, securely fastened with not less than one-half inch bolts or rivets, in accordance with the standards of equipment prescribed by said Order of the Interstate Commerce Commission of March 13, 1911.

Plaintiff further alleges that by reason of the violation of said Act of Congress and of said Order of the Interstate Commerce Commission, said defendant is liable to plaintiff in the sum of one hundred dollars. [16]

FOR A FIFTEENTH CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on September 2, 1922, hauled on its line of railroad one car, to wit: C. B. & Q. flat No. 90501, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line

of railroad from Centralia, in the State of Washington, toward Tacoma, in said State, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the uncoupling lever being disconnected from lock block of coupler on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [17]

FOR A SIXTEENTH CAUSE OF ACTION plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903 (contained in 32 Statutes at Large, page 943), defendant, on September 2,

1922, hauled on its line of railroad one car, to wit: its own box No. 24620, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad from Centralia, in the State of Washington, towards Tacoma, in said State, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "B" end of said car was out of repair and inoperative, the lock link of the coupler on said end of said car being broken, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars. [18]

FOR A SEVENTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on September 2, 1922, hauled on its line of rail-

road one car, to wit: its own flat No. 63839, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad from Centralia, in the State of Washington, towards Tacoma, in said State, within the jurisdiction of this court, when the hand brake of said car was out of repair and inefficient, the hand brake chain being broken, and when said car was not equipped with an efficient hand brake, as required by Section 2 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [19]

FOR AN EIGHTEENTH CAUSE OF ACTION plaintiff alleges that said defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of Washington.

Plaintiff further alleges that in violation of the Act of Congress approved April 14, 1910 (contained in 36 Statutes at Large, page 298), said defendant, on September 7, 1922, hauled on its standard gauge line of railroad one freight car, to wit: C. G. W. box No. 13330, over a part of a highway of interstate commerce.

Plaintiff further alleges that on said date said defendant hauled said car as aforesaid over its line of railroad in and about Seattle, in the State of Washington, within the jurisdiction of this court, when the height of the drawbar on the "A" end of said

car, measured perpendicularly from the level of the tops of the rails to the center line of said drawbar, was thirty (30) inches, and when the height of said drawbar should not have been less than thirty-one and one-half ($31\frac{1}{2}$) inches, as prescribed by an order of the Interstate Commerce Commission of October 10, 1910, which order was made in pursuance of the provisions and requirements of Section 3 of the aforesaid Act of April 14, 1910.

Plaintiff further alleges that by reason of the violation of said Act of Congress, said defendant is liable to plaintiff in the sum of one hundred dollars. [20]

WHEREFORE, plaintiff prays judgment against said defendant in the sum of Eighteen Hundred dollars and its costs herein expended.

THOS. P. REVELLE,
United States Attorney.

JUDSON F. FALKNOR,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 25, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 7138.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Answer.

Comes now the defendant and for answer to the complaint of the plaintiff denies, admits, and alleges:

I.

Admits that it is now and at all times referred to in the plaintiff's first cause of action has been a common carrier engaged in interstate commerce by railroad within the State of Washington, and that on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 67219, from Auburn to Tacoma, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's first cause of action and the whole thereof.

II.

Admits that it is now and at all times referred to in the plaintiff's second cause of action has been a common carrier engaged in interstate commerce by railroad within the State of Washington, and that

on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 61585, from Auburn to Tacoma, Washington, within the jurisdiction of this court, but denies each and every other allegation in said [22] second cause of action contained and the whole thereof.

III.

Admits that it is now and at all times referred to in the plaintiff's third cause of action has been engaged in interstate commerce by railroad within the State of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 68327 from Auburn to Eagle Gorge, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's third cause of action contained and the whole thereof.

IV.

Admits that it is now and at all times referred to in the plaintiff's fourth cause of action has been a common carrier engaged in interstate commerce by railroad within the State of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 66150, from Auburn to Narco, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's fourth cause of action and each and every part and the whole thereof.

V.

Admits that it is now and at all times referred to in the plaintiff's fifth cause of action has been a common carrier engaged in interstate commerce by

railroad, and on the 31st day of August, 1922, it it hauled on its line of railroad its own flat car No. 61611 from Auburn to Narco, Washington, within the jurisdiction of this court, [23] but denies each and every other allegation in plaintiff's fifth cause of action and the whole thereof.

VI.

Admits that it is now and at all times referred to in the plaintiff's sixth cause of action has been engaged in business as a common carrier in interstate commerce by railroad in the State of Washington, and on the 31st day of August, 1922, hauled on its line of railroad its own flat car No. 63242, from Auburn to Narco, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's sixth cause of action and the whole thereof.

VII.

Admits that it is now and was at the time referred to in the plaintiff's seventh cause of action engaged in business as a common carrier in interstate commerce by railroad within the State of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 68347, from Auburn to Narco, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's seventh cause of action and the whole thereof.

VIII.

Admits that it is now and was at the time referred to in the plaintiff's eighth cause of action engaged in business as a common carrier in inter-

state commerce by railroad within the State of Washington, and on the 31st day of August, 1922, hauled on its line of railroad its own flat car No. 67105, from Auburn to Renton, Washington, [24] within the jurisdiction of this court, but denies each and every other allegation in plaintiff's eighth cause of action and the whole thereof.

IX.

Admits that it is now and was at the time referred to in plaintiff's ninth cause of action engaged in business as a common carrier in interstate commerce by railroad within the state of Washington, and on the 31st day of August, 1922, hauled on its line of railroad its own flat car No. 64764, from Auburn to Narco, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's ninth cause of action and the whole thereof.

X.

Admits that it is now and was at the time referred to in the plaintiff's tenth cause of action engaged in business as a common carrier in interstate commerce by railroad within the state of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own coal car No. 58618, from Auburn to Tacoma, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's tenth cause of action and the whole thereof.

XI.

Admits that it is now and was at the time referred to in the plaintiff's eleventh cause of action

engaged in business as a common carrier in interstate commerce by railroad within the state of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 67399, from Auburn to Narco, Washington, [25] within the jurisdiction of this court, but denies each and every other allegation in plaintiff's eleventh cause of action and the whole thereof.

XII.

Admits that it is now and was at the time referred to in plaintiff's twelfth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 31st day of August, 1922, it hauled on its line of railroad its own flat car No. 65296, from Auburn to Tacoma, Washington, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's twelfth cause of action and the whole thereof.

XIII.

Admits that it is now and was at the time referred to in the plaintiff's thirteenth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 2d day of September, 1922, it hauled on its line of railroad its own flat car No. 61753, from Centralia, Washington, in a northerly direction, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's thirteenth cause of action and the whole thereof.

XIV.

Admits that it is now and was at the time referred to in the plaintiff's fourteenth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 2d day of September, 1922, it hauled on its line of railroad its own [26] flat car No. 64036, from Centralia, Washington, in a southerly direction, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's fourteenth cause of action and the whole thereof.

XV.

Admits that it is now and was at the time referred to in the plaintiff's fifteenth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 2d day of September, 1922, it hauled on its line of railroad C. B. & Q. flat car No. 90501, from Centralia in a northerly direction within the jurisdiction of this court, but denies each and every other allegation in plaintiff's fifteenth cause of action and the whole thereof.

XVI.

Admits that it is now and was at the time referred to in the plaintiff's sixteenth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 2d day of September, 1922, it hauled on its line of railroad its own box car No. 24620, from Centralia in a northerly direction, within the jurisdiction of this court, but denies

each and every other allegation in plaintiff's sixteenth cause of action and the whole thereof.

XVII.

Admits that it is now and was at the time referred to in the plaintiff's seventeenth cause of action engaged in business as a common carrier in interstate commerce by railroad in the state of Washington, and on the 2d day of September, [27] 1922, it hauled on its line of railroad its own flat car No. 63839, from Centralia to Tacoma, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's seventeenth cause of action and the whole thereof.

XVIII.

Admits that it is now and was at the time referred to in the plaintiff's eighteenth cause of action a common carrier in interstate commerce by railroad in the state of Washington, and on the 7th day of September, 1922, it hauled on its railroad, in switching service in Seattle, C. G. W. box-car No. 13330, within the jurisdiction of this court, but denies each and every other allegation in plaintiff's eighteenth cause of action and the whole thereof.

XIX.

Defendant further denies that it is liable to the plaintiff in the penalty of one hundred dollars (\$100.00) on account of each of the several causes of action as set forth in its complaint, or in any other sum or on any other account, or at all, or that it is liable to the plaintiff in the sum of eighteen hundred dollars (\$1,800.00), as alleged

in the several causes of action in the plaintiff's complaint, or in any other sum. [28]

For further answer and by way of an AFFIRMATIVE DEFENSE this defendant alleges:

That it is now and at all times referred to in the several causes of action set forth in the plaintiff's complaint has been a corporation duly organized and existing under and by virtue of the laws of the state of Wisconsin, and at all of said times was operating a system of railway in interstate commerce extending from the Great Lakes to Puget Sound, with various branch lines, and was a common carrier engaged in interstate commerce by railroad within the state of Washington, and that on the 1st day of July, 1922, what are known as the joint shop craft employees, including those engaged in the work of inspecting and repairing cars and the doing of general mechanical work in connection with their upkeep, in protest of an award by the United States Labor Board, a board duly created by an Act of Congress of the United States, ceased their employment and withdrew from the service of this defendant.

That said joint shop craft employees so leaving the service of this defendant did so notwithstanding the orders and findings of the United States Labor Board, acting for and on behalf of the United States, and without any fault on the part of this defendant, and that this defendant, pursuant to the directions of said United States Labor Board, proceeded to and used its best efforts towards obtaining other employees to perform the services of those

who left its service and went on strike, and endeavored to perform its duties to the shipping public and its other [29] duties as a common carrier, as imposed upon it by the so-called interstate commerce act and the various amendments thereto, and that in so doing it was required to use many of its official staff for the purpose of keeping its railway system in operation and move the various products, perishable and otherwise, tendered to it for transportation, so as to keep the public served by its line of railroad from sustaining irreparable damage and prevent a shortage of food and other necessities, and that as a consequence of the withdrawal of said shop craft employees it was for a period of a number of weeks physically impossible to keep accurate records of the condition of the various cars in the service of this defendant; that all of said cars were properly inspected, and that pursuant to the request as made by the plaintiff, through its duly constituted representatives, this defendant handled its equipment in a reasonable manner and did not permit any equipment to be used which would endanger the safety of operation or of its employees or those having business with this defendant, and that if any of the cars referred to in the plaintiff's complaint were in the condition as referred to therein the same arose as the result of an emergency, and beyond the control of this defendant and without any default on its part, and the defects, if any, were remedied as soon as consistent in view of such emergency and after movements made necessary

thereby, at the then nearest most available point therefor; that this action be dismissed and that it recover its costs herein to be taxed, and that it have such other and further relief as may be meet and equitable and consistent with the proofs upon a hearing hereof.

GEO. T. REID and
C. H. WINDERS,
Attorneys for Defendant. [30]

United States of America,
State of Washington,
County of King,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, Northern Pacific Railway Company; that said defendant is a foreign corporation and that he makes this verification for and on its behalf, being duly authorized so to do; that he has caused the foregoing answer to be prepared, knows the contents thereof, and believes the matters and things therein set forth are true.

C. H. WINDERS.

Subscribed and sworn to before me this 14th day of November, 1922.

BRUCE JENNINGS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the foregoing answer this 15th day of November, 1922.

THOS. P. REVELLE,
Attorney for Pltff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 15, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Demurrer.

Comes now the United States of America, by Thomas P. Revelle, United States Attorney for the Western District of Washington, and demurs to the affirmative defense of defendant herein, upon the ground that the same does not state facts sufficient to constitute a defense.

THOMAS P. REVELLE,
United States Attorney.

C. E. HUGHES,
Assistant United States Attorney.

Received copy of within demurrer this 25th day
of Nov., 1922.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 27, 1922. F. M. Harsberger, Clerk. By S. E. Leitch, Deputy. [32]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Order Overruling Demurrer.

This matter having come on duly and regularly to be heard on plaintiff's demurrer to the affirmative defense of defendant herein, and it appearing to the Court that said demurrer should be overruled,

It is, therefore, ORDERED and ADJUDGED that plaintiff's demurrer to the affirmative defense be and the same is hereby overruled.

It is further ORDERED that this order may be entered *nunc pro tunc* as of December 4, 1923.

DONE at Tacoma this 17th day of July, 1923.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—C. H. W.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. July 18, 1923. F. M. Harshberger,
Clerk. By S. E. Leitch, Deputy. [33]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Reply.

Comes now the plaintiff, by Thomas P. Revelle, United States Attorney for the Western District of Washington, and for a reply to the affirmative defense of defendant, admits that said defendant was at all times mentioned in plaintiff's complaint a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and was operating a system of railways in interstate commerce extending from the Great Lakes to Puget Sound and various branch lines, and was a common carrier engaged in interstate commerce by railway within the State of Washington.

Plaintiff denies each and every other allegation contained in said affirmative defense, so called.

WHEREFORE, having fully replied to defendant's answer, plaintiff prays judgment as set out in its complaint.

THOMAS P. REVELLE,
United States Attorney.
C. E. HUGHES,

Special Assistant United States Attorney. [34]

United States of America,
Western District of Washington,
Northern Division,—ss.

C. E. Hughes, being first duly sworn, on oath deposes and says: That he is Assistant United States Attorney for the Western District of Washington;

That he has read the foregoing reply, knows the contents thereof, and believes the same to be true, to the best of his knowledge and belief.

C. E. HUGHES.

Subscribed and sworn to before me this 11th day of December, 1922.

[Seal U. S. Dist. Court]

FRANK L. CROSBY, Jr.,
Deputy Clerk, U. S. District Court, Western District of Washington.

Received a copy of the within this 12th day of Dec., 1922.

C. H. WINDERS,
Attorney for Dfdt.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 9, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

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United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY, a Corporation,
Defendant.

Bill of Exceptions and Order Allowing Same.

BE IT REMEMBERED that on Tuesday, the 19th day of June, 1923, the above-entitled cause came on for trial in the above-entitled court at Seattle, Washington, before Honorable Edward E. Cushman, one of the judges of said court, sitting with a jury:

The plaintiff being represented by Mr. M. C. List, Special Assistant to the United States Attorney, and Mr. C. E. Hughes, Assistant United States Attorney, and

The defendant being represented by Mr. Chas. F. Winders, its attorney and counsel.

Whereupon the following proceedings were had:

Mr. LIST.—There was a demurrer filed to the answer set out by the defendant. The Court over-

ruled the demurrer and then there was a reply filed. I would like now to make a motion to strike from the answer the affirmative defense set up therein.

The COURT.—The motion to strike and the demurrer to the affirmative defense will be denied.

Mr. LIST.—Will you allow us an exception?

The COURT.—Exception allowed.

Whereupon a jury was duly empaneled and sworn to try the cause, opening statement on behalf of plaintiff was made by Mr. List, and the following further proceedings were had: [36]

Testimony of George B. Winter, for Plaintiff.

GEORGE B. WINTER, produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination.

(By Mr. LIST.)

Q. What is your full name?

A. George B. Winter.

Q. Where do you live, Mr. Winter?

A. Portland, Oregon.

Q. What is your business?

A. Federal inspector for the Bureau of Safety, Interstate Commerce Commission.

Q. How long have you held that position?

A. Eighteen years last March.

Q. Prior to that time were you in the railroad service? A. About twelve years.

Q. State to the Court what your duties are and what they were during the summer of 1922.

(Testimony of George B. Winter.)

A. We visit the various railroad terminals, look over and inspect the railroad equipment of all kinds, including all vehicles used on a railroad, to ascertain whether or not the cars are equipped with appliances provided for by law.

Q. Do you rely on your memory of what you see in those various yards, or do you make a record of what you see and observe?

A. We make detailed records at all times.

Q. When are those records made?

A. They are made at the time the inspection is made.

Q. Are you able to testify as to the various cars involved [37—2] in this suit without refreshing your memory from those records? A. No, sir.

Q. I will call your attention to the first cause of action and ask you, Mr. Winter, if you made any inspection in Auburn, Washington, of the Northern Pacific railway yards on August 31, 1922?

A. Yes, sir, I was in Auburn, Washington, August 31, 1922.

Q. State whether or not you inspected Northern Pacific car No. 67219 at that time and place?

A. Yes, sir.

Q. What kind of a car was that?

A. A flat car.

Q. Was it a loaded car or an empty car?

A. The car was loaded with logs.

Q. Where did you first inspect that car?

A. On track No. 6 in the train yards opposite the yard office.

(Testimony of George B. Winter.)

Q. At the time you inspected that car, what was its condition with respect to handholds,—that is end handholds?

A. The end handholds on the “B” end of the car was bent in against the end sill so that it had no clearance.

Mr. WINDERS.—He said handholds. You only allege one.

The WITNESS.—Handhold.

Mr. LIST.—With respect to handholds I asked him what the condition was.

Q. (Mr. LIST continuing.) That was on what end of the car? A. On the “B” end of the car.

Q. Just state what you mean by the “B” end of the car? [38—3]

A. That is the end upon which the brakestaff is located.

Q. On what side of the end as you face the coupler?

A. It would be the right-hand side of the end of the car as you face the coupler.

Q. Was there any handhold on that side of the end on the face of the end sill at all?

Mr. WINDERS.—I object to that question. It is not alleged other than that this handhold was bent, if your Honor please.

Mr. LIST.—I will change the question.

Q. Was there any handhold on that side of the sill of the car that could be used by a brakeman in coupling or uncoupling the cars?

A. There was not.

(Testimony of George B. Winter.)

Q. What time of day did you first inspect that car? A. About 9:15 in the morning.

Q. Did you see that car any time after 9:15?

A. The car left in a train at 10:20.

Q. What train was that, Mr. Winter?

A. A train known as extra South engine 1263.

Q. What was the condition of that car when it left in that train?

A. The handhold was bent against the end sill and had no clearance.

Q. Just state to the jury whether or not that was a train that was made up there?

A. Yes, sir, it was.

Q. And at that time was Auburn a division terminal? A. Yes, sir.

Q. Do you know whether or not it was a repair point? [39—4] A. It was.

Q. How long have you been making inspections there, Mr. Winter, prior to this time?

A. Quite a number of years. Ever since the terminal was put in. I should judge about ten.

Q. The terminal is for freight or for both passenger and freight? A. For freight only.

Q. This was a freight or passenger car?

A. This was a freight-car.

Q. Did that car go out on the main line?

A. Yes, sir.

Q. In the train? A. Yes, sir.

Q. Now, referring to the second cause of action, I will ask you whether or not you inspected Northern Pacific flat car No. 61585? A. Yes, sir.

(Testimony of George B. Winter.)

Q. About what time did you inspect that car and where was it located?

A. About 9:45. On track 6.

Q. At Auburn? A. At Auburn, Washington.

Q. Now, what was the condition of that car at that time with respect to couplers and uncouplers?

A. The car had an uncoupling lever missing on the "B" end of the car.

Q. Now, what is the effect of that missing uncoupling lever so far as the operation of the coupler is concerned?

A. It renders the coupler inoperative. [40—5]

Q. How could it have been operated?

A. Possibly it might have been operated by a man going in between the cars, but that is doubtful. Probably rendered it totally inoperative.

Q. Had it been necessary to have uncoupled these cars what, in your opinion, would have been necessary, Mr. Winter?

A. For a man to go in between the ends of the cars.

Q. Go in between the cars and do what after he got in there?

A. Attempt to raise the lock link in the bottom part of an undercut sharon coupler.

Q. Raise it with his hand?

A. Raise it with his hand.

Q. Are these cars equipped with a single uncoupling lever or a double one?

A. There is some cars that have both. This had only one.

(Testimony of George B. Winter.)

Q. On the side of the train where the uncoupling lever was missing, would there be an uncoupling lever on the adjoining car? A. No, sir.

Q. What would have been necessary had that coupler been totally inoperative in order to uncouple those cars?

A. It would have been necessary for a man to go in between the ends of the cars.

Q. In order to use the coupler on the adjoining car, Mr. Winter, what would have been necessary?

Mr. WINDERS.—I object to that.

The COURT.—I will overrule the objection.

A. It would have been necessary to go in between the cars, or go around or under or over to reach the coupler on the adjoining car. [41—6]

Q. Did you see that car any time after 9:45, Mr. Winter? A. That car left in a train at 10:20.

Q. Is that the same train as the other car left in?

A. The same train. Engine 1263, Extra South.

Q. What was its condition at the time it left in that train?

A. The uncoupling lever was missing at the time it left.

Mr. LIST.—Now, with the permission of the Court, I am going to take up the tenth cause of action, for the reason that in writing up these cases the young man in the office did not write them up in the proper order. The tenth cause of action involved a car that went out in the same train.

Mr. WINDERS.—There is no objection.

(Testimony of George B. Winter.)

Q. (Mr. LIST continuing.) Now, referring to the tenth cause of action, I will ask you whether on the same date and at the same place you inspected Northern Pacific car No. 58618? A. Yes, sir.

Q. What time of day did you first inspect that car and where was it located?

A. This car was inspected about 9:15 in the morning on track No. 6.

Q. What kind of a car was that?

A. A coal car.

Q. What is known as a gondola? A. Yes, sir.

Q. A high or low side gondola?

A. A high side gondola.

Q. At the time you inspected that car what was its condition [42—7] with respect to side ladders?

A. The side ladder tread upon the "B" end of the car was bent against the side of the car, resulting in its having no clearance.

Q. When you say bent in, do you mean it was simply bent part in or was bent in flat against the body of the car?

A. Bent in flat against the body of the car.

Q. What end of the car was that?

A. That was on the "B" end, and the second ladder tread from the top.

Q. What was the distance between the top tread and the second tread below that, assuming that the other—

Mr. WINDERS.—I object to that. That is not the allegation.

(Testimony of George B. Winter.)

The COURT.—What was the question?

Mr. WINDERS.—He wants to know the distance between that and the one below.

Mr. LIST.—The order of the Commission made pursuant to Act of Congress requires that these ladder treads shall be uniformly spaced. If there was a tread missing—the second tread from the top,—I want to show the space between the first and the third.

The COURT.—I will overrule the objection.

Mr. WINDERS.—If your Honor please, I am here prepared to meet the allegation that the second tread from the top of the side ladder near the “B” end of the car was bent.

(Argument.)

The COURT.—I overrule the objection. [43—8]

Mr. WINDERS.—So that the record may be clear, it is understood that my objection goes on the ground that the only allegation in the complaint as to the tenth cause of action is that the second tread was bent on the side ladder near the “B” end of the car, and in accordance with the practice of the Government in all of the other complaints, that is followed with a reference to the particular statutory violation. That can be seen by reading each count. It is followed up a statement that it did not thereby give two-inch clearance. I think it is outside the issues.

The COURT.—Finish your answer.

The WITNESS.—Ask the question again. You interrupted in the center of the question.

(Testimony of George B. Winter.)

Mr. LIST.—I think it is not improper for me to call your Honor's attention to the order of the Commission so that your Honor will see just what I am getting at. The order requires that the minimum length of tread on side ladders—the minimum spacing between the ladder treads—shall be 19 inches. Now, this was so bent in that that minimum spacing,—I simply want to show that it was a good deal more than 19 inches—and that there was no clearance.

The COURT.—I will overrule the objection.

Mr. WINDERS.—I reserve an exception.

Q. (Mr. LIST.) Or to state it in another way, the spacing between the top ladder tread and the next [44—9] ladder tread that could be used was how much, or what was the minimum?

A. It would be from 35 to 38 inches.

Q. In the ladder tread that was bent in, was there any part of it that could be used, or was the whole length of the tread bent in?

A. The tread was bent flat against the side of the car full length.

Q. Did you see that car any time after you made that first inspection?

A. The car left in a train at 10:20.

Q. What train was that?

A. Extra South, engine 1263.

Q. That was the same one as the other two cars that you have mentioned?

A. Yes, sir.

Q. What was the condition of that car when it went out with respect to its ladder?

(Testimony of George B. Winter.)

A. The side ladder tread was bent against the side of the car, as I have previously testified to.

Q. Now, referring to the third cause of action, Mr. Winter, I will ask you to state if on that same date and at that same place you inspected Northern Pacific flat car No. 68327?

A. Yes, sir, I did.

The COURT.—Is this the third or fourth?

Mr. LIST.—This is the third. The other was the tenth, your Honor. It was written out wrong, and I took it out of order, because it was in the same train as the first and second. I took out [45—10] the first and second, and I asked permission to take out the tenth cause of action, because the car involved in the tenth cause of action went out on the same train as those in the first and second causes of action. I thought we could follow it better that way. The last one we have been talking about is the tenth cause of action.

The COURT.—What was the defect in the third cause of action?

Mr. LIST.—We are just coming to that.

Q. (Mr. LIST continuing.) Referring now to the third cause of action, did you inspect Northern Pacific car No. 68327?

A. Yes, sir.

Q. Where was that car when you first inspected it, Mr. Winter?

A. Track No. 2 in the Auburn yard.

Q. What time did you first inspect that car?

A. About 9:30 A. M.

(Testimony of George B. Winter.)

Q. What was its condition with respect to couplers and uncoupling apparatus?

A. The undercut tower uncoupling lever was missing from the "B" end of the car.

Q. What effect did that have on the operation of that coupler?

A. Rendered it inoperative.

Q. What would have been necessary in order to operate that coupler or uncoupler?

A. It would require a man to go in between the ends of the cars. [46—11]

Q. Did you see that car any time after your first inspection?

A. The car left at 10:10 A. M.

Q. In what train?

A. In a train called Extra East, engine 1616.

Q. Was that a Northern Pacific train?

A. Yes, sir.

Q. Did it go over a branch line or main line, or in a switching operation?

A. It went over the main line.

Q. What was its condition when it went out in that train?

A. The lever was still missing.

Mr. LIST.—Now, for the information of the Court and jury, the next eight cars involved movements all in the same train.

Q. (Mr. LIST continuing.) Now, Mr. Winter, referring to the fourth cause of action, state whether or not you inspected Northern Pacific car 66150 at Auburn on the same day?

A. Yes, sir; on the same day.

(Testimony of George B. Winter.)

Q. About what time did you first inspect that car?

A. Well, these cars were inspected about 9:30.

Q. You say "these cars." What do you have in mind?

A. This car.

Q. Where was it located at that time?

A. I would like to correct that last answer, if the court please. This car was inspected in connection with the other counts in the train between 8:30 and 9:30,—during that interval.

Q. What was its condition at the time you inspected it with respect to efficient hand brakes? [47—12]

Mr. WINDERS.—I think that is calling for a conclusion of the witness, if your Honor please. I object to it on that ground.

The COURT.—Well, it does not call for a "yes" or "no" answer, so I will overrule the objection.

A. The hand—the brake—hand brake was inoperative.

Q. (Mr. LIST continuing.) In what way?

A. The logs that were loaded on the car were on the brake wheel.

Q. Were they on there so tight that the brake wheel could not be used at all?

A. On there sufficiently tight that you could not turn the wheel.

Q. Did you attempt to operate that to see if it was inoperative?

A. Yes, sir.

(Testimony of George B. Winter.)

Q. Was there any hand brake on the other end of the car that could have been used?

A. No, sir.

Q. Did you see that car any time after you first inspected it?

A. Yes, sir.

Q. What was its condition at that time?

A. The car left in a train at 9:50 in the same condition.

Q. What train was that, Mr. Winter?

A. Train No. 930; engine 1784.

Q. That is a Northern Pacific train?

A. Yes, sir.

Q. Was that a road train?

A. Yes, sir. [48—13]

Q. In which direction did that go?

A. The train moved north and east.

Q. Referring, now, to the fifth cause of action, Mr. Winter, I will ask you whether or not you made any inspection at the same place and date of Northern Pacific flat car No. 61611?

A. Yes, sir.

Q. What was its condition at the time you first inspected that car?

A. The brake shaft was bent. It was inoperative.

Q. Did you try that brake shaft?

A. Yes, sir.

Q. Was there any hand brake on the other end of the car?

A. No, sir.

Q. When did you last see that car?

(Testimony of George B. Winter.)

A. It left on the train at 9:50.

Q. What train was that?

A. The train 930; engine 1784.

Q. What was its condition when it went out in that train?

A. The brake shaft was still bent.

Q. Was that brake staff so bent that it was only partially inoperative or totally inoperative?

Mr. WINDERS.—I object to that as leading.

The COURT.—Objection sustained. It is too leading.

Q. (Mr. LIST continuing.) Just state to what extent the brake staff was bent?

A. The brake staff was bent so that it would not operate.

Q. Referring, now, to the sixth cause of action, state whether or not you inspected Northern Pacific flat car [49—14] No. 63242?

A. Yes, sir.

Q. Where was that car when you first inspected it?

A. On the outbound track in the Auburn yard.

Q. What time did you first inspect that?

A. Between the hours of 8:30 and 9:50.

Q. What was its condition at that time with respect to handholds on the "A" end of the car?

Mr. WINDERS.—Which one are you at now? The sixth?

Q. (Mr. LIST continuing.) What was its condition at that time, Mr. Winter, with respect to hand brakes?

(Testimony of George B. Winter.)

A. The brake shaft was bent, and it was inoperative.

Q. Was there any hand brake on the other end of the car?

A. No, sir.

Q. When you speak of a brake shaft on these last cars, what do you have in mind? Just explain to the jury what a brake shaft is.

A. A vertical metal rod about an inch and a quarter in diameter extending above the deck of a flat car about 30 to 35 inches, attached to the top of which is a wheel. Near the deck of the car is an appliance such as a pawl and wheel to turn the shaft and wheel and set the brakes on the car by the action of chains and lever.

Q. You mean a hand brake?

A. Yes, sir.

Q. Did you see that car any time after your first inspection?

A. That car left in this same train at 9:50.

Q. What was its condition at that time, Mr. Winter?

A. It was still inoperative. [50—15]

MR. WINDERS.—I am assuming that you saw it leave.

The WITNESS.—Yes, sir.

Q. (Mr. LIST continuing.) Referring now to the seventh cause of action, did you on the same date and at the same place inspect Northern Pacific flat car No. 68347? A. Yes, sir.

Q. When did you first inspect that car?

(Testimony of George B. Winter.)

A. During the time between 8:30 and 9:50 in the morning.

Q. What was its condition at the time you first inspected it with respect to handholds on the "A" end?

A. The handhold was missing on the "A" end of the car on the side.

Q. On the left or right hand side as you face the end, Mr. Winter?

A. That would be the left side.

Q. That is on the side of the car or on the end of the car? A. On the side of the car.

Q. That would be as you faced the side of the car— A. On the left corner.

Q. That would be near the "A" or "B" end of the car? A. This was on the "A" end of the car.

Mr. WINDERS.—I move to strike the evidence, Your Honor. The allegation is that it is on the right-hand end of the side of the car near the "A" end thereof. That is the one we are called upon to meet.

Mr. LIST.—That is what we are talking about.

Mr. WINDERS.—He said on the left.

The COURT.—Is this the seventh cause of action?

Q. (Mr. LIST continuing.) Mr. Winter, in order to correct a [51—16] misunderstanding, this was a side handhold? A. Yes, sir.

Q. State its location on the side as you face the side of the car or as you face the end of the car, whichever you prefer?

(Testimony of George B. Winter.)

A. If I faced the side of the car it would be on the right-hand corner of it. If I faced the end of the car it would be on the left-hand corner.

Q. On the side near the "A" end?

A. Yes, sir.

The COURT.—Objection overruled.

Q. Did you see that car any time after you made the first inspection? A. When it left at 9:50.

Q. What was its condition when it went out in that train?

A. In the same condition that I have just stated.

Q. Is that the same train as the others?

A. Yes, sir.

Q. Now, referring to the eighth cause of action, Mr. Winter, I will ask you to state if you made an inspection of Northern Pacific flat car No. 67105?

A. Yes, sir.

Mr. WINDERS.—I will admit that is a crippled car.

Mr. LIST.—Defective as alleged.

Mr. WINDERS—I don't know. It was so badly defective that it was taken to Renton to be repaired.

Mr. LIST.—If you can't admit that it was defective as alleged, we will have to prove it.

Q. (Mr. LIST continuing.) Referring to the eighth cause of [52—17] action, did you inspect Northern Pacific flat car No. 67105?

A. Yes, sir.

Q. When did you first inspect that car?

(Testimony of George B. Winter.)

A. During the time between 8:30 A. M. and 9:50 A. M. on the 31st of August, 1922.

Q. What was the condition of it at that time in respect to hand brakes?

A. The brake wheel was missing.

Q. Was there any way to operate the hand brake on that car? A. No, sir.

Q. Did you see that car leave in that condition?

A. Yes, sir; it left in that same train.

Q. Now, referring to the ninth cause of action, I will ask you to state whether or not you inspected Northern Pacific flat car No. 64764?

A. Yes, sir.

Q. What time of day did you first inspect that car? A. Between the hours of 8:30 and 9:50.

Q. What was its condition at that time with respect to handholds?

A. The handhold was missing on the left side and also on the right side.

Q. Near what end of the car

A. On the "B" end.

Q. Would that make one handhold missing from each side rather than two handholds missing from one side?

A. One handhold missing from each side.

Q. Near the "B" end? A. Yes, sir. [53—18]

Q. Did you see that car any time after you made your first inspection?

A. It left in this train at 9:50.

Q. What was its condition when it went out in that train? A. The same as I have just stated.

(Testimony of George B. Winter.)

Q. Referring now to the eleventh cause of action, I will ask you to state if you inspected Northern Pacific flat No. 67399? A. Yes, sir.

Q. What kind of a car was that?

A. A flat car.

Q. When did you first inspect that car, Mr. Winter?

A. During this time between 8:30 and 9:50.

Q. What was its condition with respect to handholds?

A. The handhold was bent on the "B" end on the right side as you—

Q. Was it a side or end handhold?

A. A side handhold.

Q. As you face the side of the car which side have you in mind?

A. It would be on the right-hand corner.

Q. Near what end of the car?

A. The "B" end.

Q. To what extent was the handhold bent?

A. It had no clearance.

Q. In other words, you mean it was mashed flat against the body of the car? A. Yes, sir.

Q. Did you see that car after you made your first inspection? A. Yes, sir. [54—19]

Q. What time was that?

A. When it left at 9:50.

Q. Was that in the same train,—No. 930?

A. Yes, sir.

Q. What was its condition when it went out on that train? A. The same as I have just stated.

(Testimony of George B. Winter.)

Q. Now, referring to the twelfth cause of action, I will ask you to state if you inspected Northern Pacific flat car No. 65296? A. Yes, sir.

Q. When did you first inspect that car?

A. Between the hours of 8:30 and 9:50.

Q. What was its condition at that time with respect to hand brakes?

A. It had a bent brake shaft.

Q. On what end of the car?

A. On the "B" end.

Q. What effect did that have upon the operation of the hand brake?

A. It rendered it inoperative.

Q. Was there any hand brake on the other end of the car? A. No, sir.

Q. Did you see that car leave? A. Yes, sir.

Q. In what train?

A. Train 930; engine 1784, at 9:50 A. M.

Q. What was its condition, Mr. Winter, when it left in that train?

A. The same as I have just stated.

Q. Was that in the Northern Pacific train?
[55—20]

A. Yes, sir.

Q. Was that a road movement, or what is commonly known as a transfer movement or a switching operation? A. It was a road movement.

Q. And that train, I believe, was hauled out of Auburn, Washington?

A. I did not get the question.

Q. That movement was out of Auburn?

(Testimony of George B. Winter.)

A. Yes, sir.

Q. Referring now to the thirteenth cause of action, Mr. Winter, I will ask you to state if you made any inspections at Centralia, Washington, on September 2, 1922?

A. Yes, sir; I was in Centralia, Washington, on September 2, 1922.

Q. Did you make any inspections in the Northern Pacific yard? A. Yes, sir.

Q. State whether or not at that time and place you inspected Northern Pacific flat car No. 61753?

A. I did; yes, sir.

Q. Where was that car when you first inspected it and what time was it?

A. We first inspected the car about 7:10 A. M. on track No. 3.

Q. What was its condition at that time with respect to handholds?

A. On the "A" end of the car,—the car was loaded with logs,—and a log extended out over and on top of the handhold on the end of the car.

Q. What effect did that have upon the operation of the [56—21] handhold?

Mr. WINDERS.—It would seem that this witness should state exactly what the situation was. The law says there should be two inches clearance.

The COURT.—Objection sustained.

Q. (Mr. LIST continuing.) Mr. Winter, was there any handhold on that side of the end of the car? A. There was a handhold there; yes, sir.

Q. Was it such a handhold as could be used?

(Testimony of George B. Winter.)

A. It could not be used.

Q. Why was that?

A. Because it had no clearance.

Q. Did you see that car any time after you made the first inspection? A. Yes, sir.

Q. When was the last time you saw it?

A. As it left in a train at 7:40 A. M.

Q. What train was that, Mr. Winter?

A. Train Extra North. Engines 1251 and 1611.

Q. Was that a Northern Pacific train?

A. Yes, sir.

Q. Was that a road movement or a switching or transfer movement?

A. That was a road movement.

Q. Going in what direction?

A. Towards,—going North and West; principally North.

Q. What was its condition when it left in that train? A. Same as I have just testified.

Q. Now, referring to the fourteenth cause of action, I will ask you to state if at Centralia on the same date you [57—22] inspected Northern Pacific flat car No. 64036? A. Yes, sir.

Q. Where did you first inspect that car, Mr. Winter?

A. On track No. 6, and also when it was being switched there.

Q. About what time was that?

A. About 8:30 A. M.

Q. What was its condition at that time with respect to a sill step?

(Testimony of George B. Winter.)

A. The sill step was missing from the "A" end of the car on the right corner.

Mr. WINDERS.—I move to strike that evidence. The allegation is that the sill step was broken.

The COURT.—You may explain it and see if we can harmonize this.

A. The sill step was broken off so that the step that could be used to get on to the car or step in to the car was missing.

The COURT.—Objection overruled.

Mr. WINDERS.—Exception, your Honor.

The COURT.—Exception allowed.

Q. (Mr. LIST continuing.) Was that the whole sill step, or only part of it, Mr. Winter?

Mr. WINDERS.—He said it was broken off.

Mr. LIST.—I want to find out what part.

A. That part was broken off that could be used as a sill step.

Q. You mean the bottom part? A. Yes.

Mr. WINDERS.—The tread. [58—23]

The WITNESS.—The tread.

Q. (Mr. LIST continuing.) Did you inspect that car any time after that?

A. Yes, sir, as it left in a train at 10:30 A. M.

Q. What train was that?

A. Train known as 969 South; engine 1263.

Q. Was that a Northern Pacific train?

A. Yes, sir.

Q. What was the condition of that car when it went out on that train?

A. The same as I have just stated.

(Testimony of George B. Winter.)

Mr. WINDERS.—What engine did you say was pulling that car?

The WITNESS.—1263.

Q. (Mr. LIST continuing.) I believe you stated the number of the train was 969,—is that correct?

A. Yes, sir.

Q. Referring, now, to the fifteenth cause of action, I will ask you to state if at Centralia on the same date you inspected a car known as C. B. & Q. car No. 90501? A. Yes, sir.

Q. What kind of a car was that?

A. A flat car.

Q. What time did you first inspect that car, Mr. Winter?

A. About 6:00 o'clock in the morning while switching.

Q. What was its condition at that time with respect to automatic couplers?

A. The uncoupling chain connection connecting the uncoupling lever to the coupler was broken,—disconnected.

Q. What effect did that have upon the operation of the [59—24] coupler?

A. Rendered it inoperative.

Q. What end of the car was that?

A. On the "B" end of the car.

Q. How could that have been operated, if at all?

A. By a man going in between the ends of the car.

Q. Did you see that car any time after the first inspection?

(Testimony of George B. Winter.)

A. Yes, that car left at 7:15 A. M.

Q. In what train?

A. Extra North engine 1672.

Q. Was that a Northern Pacific train?

A. Yes, sir.

Q. State whether or not it was what is commonly known as a road or transfer movement or switching operation? A. It was a road movement.

Q. What was its condition when it went out in that train, Mr. Winter?

A. Same as I have just testified to.

Mr. LIST.—For the information of the Court, the next two counts involve cars in the same train out of Centralia.

Q. Referring to the sixteenth cause of action, Mr. Winter, state whether or not you inspected Northern Pacific box-car No. 24620? A. Yes, sir.

Q. When did you first inspect that car?

A. About six o'clock in the morning.

Q. What was its condition at that time with respect to automatic couplers?

A. The lock link was broken on the "B" end of the car. [60—25]

Q. Just state what you mean by the lock link?

A. That is a part of the uncoupling chain mechanism that connects the uncoupling lever to the coupler.

Q. What effect did that have on the operation of the coupler by means of a lever?

A. Rendered it inoperative.

Q. How could it have been operated?

(Testimony of George B. Winter.)

A. Requiring the presence of a man in between the ends of the cars or go around the other side.

Q. Going around the other side to use that particular coupler?

A. No, to use the coupler on the adjoining car.

Q. Did you see that car any time after your first inspection?

A. Yes, sir; as it left in this train at 7:15 A. M.

Q. What train was that?

A. Extra North, engine 1672.

Q. What was its condition when it went out in that train?

A. Same as I have just testified to.

Q. Referring now to the seventeenth cause of action, I will ask you to state if at Centralia on the same date you inspected Northern Pacific flat car No. 63839? A. Yes, sir.

Q. What time of day did you first inspect that car?

A. That is about the same time as the other two cars; six A. M.

Q. What was its condition with respect to hand brakes? A. The brake chain was broken.

Q. What effect did that have upon the operation of the hand brake?

A. It would render it inoperative. [61—26]

Q. Was there any hand brake on the other end of the car? A. No, sir.

Q. Did you see that car any time after you first inspected it? A. Yes, sir.

Q. When was the last time you saw it?

(Testimony of George B. Winter.)

A. When it left in the train at 7:15 A. M.

Q. Was that the same train you just testified to at 7:15? A. Yes, sir.

Q. Engine 1672? A. Yes, sir.

Q. What was its condition when it went out in that train?

A. The hand brake was inoperative.

Q. Referring, now, to the eighteenth cause of action, Mr. Winter, I will ask you to state if you inspected C. G. W. car No. 13,330 at Seattle on September 7, 1922?

A. C. G. W. box-car 13,330, yes, sir.

Q. What kind of a car was that? A freight or passenger car? A. A box-car.

Q. A freight-car, you mean? A. A freight-car.

Q. Where was this car when you first inspected it?

A. On track No. 4 of the interchange yard at Hanford Street.

Q. Of the interchange yard between what railroads?

A. Between the Oregon-Washington Railroad & Navigation Company and the Northern Pacific Railroad and the Great Northern.

Q. What was the condition of that car at that time with respect to the height of its draw bar?

A. The height of the draw bar was 30 inches on the "A" end [62—27] of the car.

Q. On the "A" end. Just state to the jury how you know it was 30 inches, and how you measured it, if you did measure it?

(Testimony of George B. Winter.)

A. The measurement is made by taking the measurement between the top of the rails and the center line of the draw bar by a 5-foot or 3-foot or 4-foot rule.

Q. In order to determine the accuracy of your measurements, how do you arrive at the center of the draw bar, Mr. Winter? Did you have to guess at it, or is there anything on there?

A. There is two different ways that you may do that. The core line of the coupler has a—

Mr. WINDERS.—I submit, your Honor, that it is immaterial how they may do it. The question is how they did it in this case.

Mr. LIST.—It shows the accuracy of their measurement.

The COURT.—I think that is redirect examination in case the accuracy of the measurement is attacked.

Mr. LIST.—That is possibly true. I thought I would save a little time.

The COURT.—Objection sustained.

Q. (Mr. LIST, continuing.) Did you see that car any time after that time?

A. Not after its movement.

Q. When you saw it first on the interchange track? A. I measured it several times.

Q. That is on the interchange track? [63—28]

A. Yes, sir; I first inspected it at 8:00 A. M.

Q. Did you see it move from the interchange track? A. Yes, sir.

Q. What manner of movement was that?

(Testimony of George B. Winter.)

A. That was a transfer or interchange movement of the car between the two different railroads.

Q. What railroads were they?

A. This car was taken off the interchange track by the Northern Pacific.

Q. What engine was that? A. Engine 924.

Q. What time was that taken off by the Northern Pacific? A. At 830 A. M.

Q. What movement was made of it at that time?

A. It was hauled over into the Northern Pacific yard.

Q. Did you know its condition at the time it was hauled from the interchange track? A. Yes, sir.

Q. What was its condition?

A. The coupler measured 30 inches high.

Q. Did you see that coupler fixed before it left there?

Mr. WINDERS.—I object to that.

The COURT.—Objection overruled.

A. What is the question?

Mr. WINDERS.—He asked you if you saw that fixed.

A. No, sir, I did not see them fix it.

Q. (Mr. LIST.)—State whether or not you know of your own knowledge that it left the interchange track and was hauled by the Northern Pacific in that same condition?

Mr. PINDERS.—I object to that. [64—29]

The COURT.—Objection overruled.

A. I saw the car leave the transfer track, as I have stated.

(Testimony of George B. Winter.)

Q. (Mr. LIST.)—Was that over a standard or narrow gauge?

A. Standard gauge railroad.

Mr. LIST.—I am going to call the court's attention to another matter. I don't want to take up the time or go into it through the witness at this time. It may be proper direct examination. The witness will testify, if counsel wants it, as to the location of the particular cars in question with respect to the other cars in the train so as to show how the defective cars were made up in the train.

Mr. WINDERS.—Counsel is trying his own case.

The COURT.—Objection sustained. I will excuse the jury until 2:00 o'clock. (Addressing the jury.) Gentlemen, you will be careful during this adjournment to observe all the cautions that I have given you in any other cases and refrain from discussing this case among yourselves or permit any other person to discuss it with you or in your presence. You will hold no communication with any of the attorneys or any of the witnesses.

(Jury retired.)

The COURT.—Now, if you will state what you want, Mr. List.

Mr. LIST.—What I was going to do,—I wanted to save time without going into details, because [65—30] the jury cannot remember all the numbers of these cars. But in every inspection that was made by this witness and the other witness there is shown not only the condition of these cars, but there is shown in his report what car was

attached to the "A" end of the defective car, and what car was coupled to the "B" end of the defective car. That can all be verified by the wheel reports of the Northern Pacific.

If there is going to be any question about these cars being hauled out in these trains, then I will bring that in detail. I will also verify it by our own records. I don't understand there is any question.

The COURT.—You may be allowed to do something of that kind in rebuttal. I don't think it is a part of your case in chief.

Mr. LIST.—I had my doubts about that.

The COURT.—I don't think you have to anticipate all the eventualities. When the defense is developed, it may save a lot of time to meet it then.

Mr. LIST.—I understand, then, that it will be admissible in rebuttal if the accuracy of these reports is questioned.

Mr. WINDERS.—I am going to question the accuracy of the inspector's reports. I am not agreeing for a single minute that there is a single defective car except certain cars that went out to Renton to be repaired. I am going to deny [66—31] and I am going to produce my evidence here showing that except those cars that we took out for the purpose of having them repaired at Renton or at other points, they were in good shape when they left the yard.

Mr. LIST.—I will make my offer to prove at two o'clock.

(Testimony of George B. Winter.)

The COURT.—You might make it now.

Mr. LIST.—The Government offers to prove by the witness Winter that when each of the defective cars to which he testified left in these trains, he also made a record of the car to which each end of the defective car was coupled. That with respect to the first cause of action the witness would testify that coupled to the “A” end of the car that was claimed to be defective was Northern Pacific flat car No. 67,476, and coupled to the “B” end of the car which is claimed to be defective was Northern Pacific flat car No. 62,296. That as to the second cause of action the witness Winter will testify that with respect to the defective car there was coupled to its “A” end Northern Pacific box-car No. 31,691, and coupled to its “B” end was Northern Pacific flat car No. 65,336.

Mr. WINDERS.—I am not going to object, but I don’t know what it has got to do with the case. I am not going to admit the accuracy of the reports, but if he wants to fill up the record by showing it, I will not object. [67—32]

The COURT.—Very well. You will be allowed to introduce your further evidence. The court is at recess until 2 o'clock.

(Recess till two o'clock P. M.)

Afternoon Session, Two O'clock.

Continuation of proceedings. All parties present.

Q. (Mr. LIST, resuming direct examination.) You testified that Auburn was at this time a divi-

(Testimony of George B. Winter.)

sion terminal and the three trains leaving there with these cars were made up there? A. Yes, sir.

Q. What was Centralia at that time? Simply a passing station or a division terminal?

A. A divisional terminal.

Q. For freight trains? A. Yes, sir.

Q. These cars that you testified as to being hauled out of Centralia—were they picked up by passing trains or were the trains made up there?

A. The trains were made up there.

Q. Was anybody with you when you made these several inspections? A. William E. Weeks.

Q. Mr. Weeks of the Interstate Commerce Commission? [68—33] A. Yes, sir.

Q. Did you make independent inspections and independent records, or did you make joint records?

A. We made independent records.

Q. Mr. Winter, will you refer to your notes—I want to run over the number of each car, just showing the initials and numbers of the cars that these cars that you testified to as being defective were coupled to, taking the first count—

Mr. WINDERS.—I am perfectly willing that he take and read them down the list without question.

Q. (Mr. LIST.) Will you just read that?

A. You wish me to read the tenth count as you put it in evidence?

Q. Yes. Read the first, second, and tenth, and then on down the rest in order.

A. The first count was Northern Pacific car No. 67219. Coupled to the "A" end of that car was

(Testimony of George B. Winter.)

Northern Pacific flat car No. 67476. To the "B" end was 62296. The second count was Northern Pacific flat car No. 61585. Coupled to the "A" end was Northern Pacific box-car 31691. To the "B" end Northern Pacific flat car 65336. The tenth cause was Northern Pacific coal car 58618. Coupled to the "A" end was Northern Pacific coal car 57861. On the "B" end was Northern Pacific flat car 66240. The third count was Northern Pacific flat car 68327. Coupled to the "A" end was 61804, and to the "B" end was 66363. The fourth count was Northern Pacific flat 66150. Coupled to the "A" end was 63830 [69—34] and to the "B" end 66468. The fifth count was N. P. 61611. Coupled to the "A" end was 63830 and to the "B" end 66975. The sixth cause was N. P. 63242. Coupled to the "A" end was 68347 and to the "B" end was 61745. The seventh cause was N. P. flat 68347. Coupled to the "A" end was 63242 and the "B" end 64569. The eighth cause was N. P. flat 67105. Coupled to the "A" end was 61392 and to the "B" end 63060. The ninth cause was N. P. 64764. Coupled to the "A" end was 68014 and on the "B" end 66468. The eleventh cause of action was N. P. 67399. Coupled to the "A" end was 61901 and to the "B" end was 63917. The twelfth cause was 65296. Coupled to the "A" end was 62467, and to the "B" end 65994. The thirteenth cause of action was Northern Pacific flat 61753. Coupled to the "A" end was Northern Pacific 67000, and on the "B" end 65197. The fourteenth cause of action

(Testimony of George B. Winter.)

was Northern Pacific flat 64036. On the "A" end was Northern Pacific flat 68896 and on the "B" end Northern Pacific box 137601. The fifteenth cause was C. B. & Q. 90501. On the "A" end was B. & O. box 18994, and on the "B" end was Northern Pacific box 79470. The sixteenth cause was N. P. box 24620. On the "A" end was C. & N. W. 56100 and on the "B" end was N. P. 33690. The seventeenth cause was N. P. flat 63839. On the "A" end was N. P. 65642. On the "B" end was 62213. The eighteenth cause of action was C. G. W. 13330. On the "A" end was G. N. box 210358, and on the "B" end was Great Northern box 120238. [70—35]

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Winter, how long have you been inspecting cars for the Commission or for the Government?

A. A little over eighteen years.

Q. How much of that time have you been over on the coast? A. About fifteen years.

Q. During how much of that time have you and Mr. Weeks worked together?

A. About twelve years.

Q. You always work together, don't you?

A. No, sir.

Q. You never come into court unless you both testify to the same cars, do you? Have you ever come into court on a prosecution unless you both were here with the same record? A. No, sir.

Q. Now, what day of the week was August 31?

(Testimony of George B. Winter.)

A. I could refer to a calendar. I can't tell you offhand now.

Q. How long had you been at Auburn prior to the 31st? Did you go there that day or the day before?

A. I think we went there early that morning.

Q. Where did you go from?

A. I cannot recall now without referring to some travel records.

Q. Did you go from here or Portland or Tacoma?

A. I would not like to say.

Q. Anyhow, you did not get into Auburn until the morning of the 31st? [71—36]

A. To the best of my recollection we arrived there that morning.

Q. How many cars were there in the Auburn yard on the morning of August 31?

A. Several hundred.

Q. Several hundred. Would you make it several thousand? A. No, sir.

Q. How long were you around there on the 31st?

A. Most of the day.

Q. How many cars were handled in that yard on the 31st,—went through that yard?

A. I don't know.

Q. Give the jury the benefit of your expert opinion.

A. I would say while I was there in the neighborhood of two hundred.

Q. In the neighborhood of two hundred? Well how long were you there?

(Testimony of George B. Winter.)

A. We were there until afternoon.

Q. You were there until afternoon?

A. I don't just recall now.

Q. What time did these trains in which these cars that you testified about leave the Auburn yard?

A. What time did these trains leave?

Q. Yes.

A. In relation to the violations or the total number handled?

Q. What time of day did these trains leave the Auburn yard?

A. During the time I was there.

Q. Well, I know. What time?

A. Between the hours, I think, of about six A. M. and I [72—37] would say twelve or one o'clock.

Q. Were you in the city of Auburn as early as six o'clock in the morning on the 31st of August?

A. No, it was six o'clock at Centralia and about eight o'clock at Auburn.

Q. Was there any other trains went out of the yard at the time you were there other than these three trains that you testified about?

A. To the best of my recollection there were, yes.

Q. There were? A. Yes.

Q. How many, do you know? A. I do not.

Q. As a matter of fact, there was not a single one of these cars that you testified to that went out on the main line, was there?

A. Every one of them went out on the main line.

(Testimony of George B. Winter.)

Q. I mean over the main line,—hauled over the Cascade Mountains?

A. I speak of the main line as the eastbound main line.

Q. I beg your pardon. I should have said that there wasn't any of these cars that you testified about that went out east over the Cascade mountains?

A. I have not a record that they went out over the mountains.

Q. They were practically all log flats or log cars or coal cars? Were there any cars that you testified to at Auburn that were not a log flat or a coal car?

A. I think they covered principally log flats and coal cars.

Q. Have you any independent recollection, Mr. Winter, about [73—38] those cars other than what you have written down in that memorandum book? A. A slight recollection, yes.

Q. You have a recollection of being there on that morning?

A. Due to some other circumstances, yes.

Q. Now, you have testified that you got up on these five or six or seven log flats on which you say the brake staff was bent and you tried that brake staff? A. Yes.

Q. Was anybody with you up on the car? Did Weeks go up there with you on the car?

A. It is not necessary to get up on the flat car

(Testimony of George B. Winter.)

sometimes to tell whether hand brakes will operate or not.

Q. Did you get up on these flat cars and try these hand brakes on which you claim the brake staff was bent? A. I think we did.

Q. Did you or did you not? What is your testimony? A. I would say "yes."

Q. When? A. At the time—

Q. Get out your book and tell us about the hour?

A. At the time they were inspected.

Q. Well, tell us about the hour?

A. Well, I would have to go into each individual case.

Q. I think I have a memorandum that would help you. We will take the fifth one. You say the hand brake shaft was bent. Did you get up on that car? If you did, what time of day? That is 61611.

A. That particular car was inspected between the hours of 8:30 A. M. and 9:50 A. M. to ascertain— [74—39]

Q. Between 8:30 and what time? A. 9:50.

Q. Well, that is an hour and twenty minutes?

A. Yes, sir.

Q. Can you give any more definite data? Don't you mark down the time on your books? When did you mark down on that 8:30 and 9:50?

A. At the time these records were made that morning opposite the train in the yard.

Q. After you had got through with all your inspections?

(Testimony of George B. Winter.)

A. During the time of the inspections.

Q. Well, have you got any data there as to whether or not it was 8:30 or whether it was 9:30 or 9:50 when you examined this fifth cause of action? There is a leeway of an hour and twenty minutes. Do you know whether you examined that at 8:30 or 9:00 or 9:30? A. I wouldn't say, no.

Q. Then, you did not write down the time of your inspection in your book at the time that you made the inspection, did you?

A. Not with that individual car.

Q. Not on that individual car. Did you get on that car and try the brake?

A. I tried the brake. I would not say whether I got on the car or not.

Q. Did Mr. Weeks try it with you?

A. He did.

Q. You both tried it. Could you try that brake from the ground?

A. You could, yes. [75—40]

Q. Was there a load of logs on it?

A. The car was loaded with logs; yes, sir.

Q. Did you try it more than once? Did you try that brake more than once?

A. I would not say that we did.

Q. What is that?

A. I would not say that we did.

Q. Well, the jury would like to know whether you did or did not. Did you try the brakes on that car, the fifth cause of action,—more than once?

(Testimony of George B. Winter.)

A. We tried the brake when we inspected the car and noticed the condition of the car. And when it left in the train at 9:50 it was in the same condition.

Q. Of course you understand that in order to get a conviction you have to testify that. Now, you mean to tell this jury in answer to my question that you tried the brake on this car more than once?

A. I would not say that I did.

Q. Did you or did you not?

A. I would not say.

Q. Did you on that day try the brakes on any of these cars more than once?

A. I don't know. I would not say.

Q. Then you say that you can't tell whether or not you examined this car at 8:30 or 9:00 or 9:30? Was the engine hooked onto this train when you examined and tested this brake?

A. I don't believe it was.

Q. You won't say that you got up on the car, will you, Winter? [76—41] A. No, sir.

Q. At that time there were some of these trainmen,—I don't say all or the majority of them, but a few of the trainmen working for the Northern Pacific and the other railroad companies that were not out on strike that were quite active in trying to help the strikers out?

Mr. LIST.—If the Court please, that is objected to as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. WINDERS.—It is a preliminary question.

(Testimony of George B. Winter.)

Mr. LIST.—Exception.

Q. (Mr. WINDERS continuing.) There was a stray man or two that was not any too loyal to the railroad? A. I would say generally—

Q. I didn't say generally. I have a great deal of pride in the employees of the Northern Pacific; but I say there were a few stray ones that were not very loyal,—that were trying to help make things as miserable as they could in the operation of these yards,—isn't that true?

Mr. LIST.—If the Court please, we object to that as incompetent, irrelevant and immaterial.

The COURT.—I think I will sustain the objection to that.

Q. (Mr. WINDERS.) Is it not a fact, Mr. Winter, that there were continually tales being carried to you and to Mr. Weeks from men who were drawing salaries from the Northern Pacific and from other corporations, complaining about the equipment? A. Yes, sir. [77—42]

Q. Did any of these men tell you,—referring to this fifth cause of action,—that this particular brake staff was bent? A. No, sir.

Q. Did any of these men call your attention to this particular brake staff? A. No, sir.

Q. When you found this brake staff,—now referring to the fifth cause of action,—inoperative, you saw a good many officials of the Northern Pacific around inspecting the cars, didn't you?

A. I won't say that I saw a good many officials.

Q. Now, Mr. Burnham, Assistant Western Traf-

(Testimony of George B. Winter.)

fic Manager,—did you see Mr. Burnham or Mr. Crawford,—did you see those men out there that morning along these trains?

A. I believe I remember the two gentlemen, yes, sir.

Q. Did you say anything to them about this brake staff not working? A. No, sir.

Q. Did you say anything to them or any other men working along those cars inspecting them as to any of these other defects you have testified to in the other eighteen cars,—as to the rest of the eighteen cars? A. No, sir, not at that time.

Q. Did you ever say anything to Mr. Burnham or any of the other gentlemen there,—Mr. Burnham or Mr. Crawford or Mr. Allmain,—this gentleman here,— or Mr. Alsip back here, at Centralia, about the cars you are complaining about in this case?

Mr. LIST.—I object to that as incompetent, irrelevant [78—43] and immaterial.

The COURT.—Objection overruled.

Mr. LIST.—Exception.

A. No, sir.

Q. (Mr. WINDERS.) If you had climbed on any of the cars along there that morning and tried to test any of these brakes to see if they were fouled so that they would not work, you would be in plain view of the men working along the trains?

A. We were in plain view.

Q. I beg your pardon?

A. We were in plain view.

(Testimony of George B. Winter.)

Q. If you got up on any of the cars they could see you, couldn't they?

A. Any more so than they could where we were.

Q. Well, your answer as to this fifth cause of action as to getting up on the car and trying this brake,—would your answer as to these other cars on which you say the brake would not work be equally indefinite? Did you or did you not get up on any of the cars on which you claim the brake staff was bent so that it would not work?

A. I would not say.

Q. Did Mr. Weeks in your presence get up on any of them? A. I cannot tell.

Q. Did you see him when he was with you work any of these brake staffs? A. Yes, sir.

Q. You did? So, as a matter of fact, you were together, were you? [79—44] A. Yes, sir.

Q. Can you give this jury from your records the hour when you tested a single one of these numerous bent brake staffs that you are talking about on the 31st of August at Auburn or the second day of September in Centralia?

A. As I stated before, I think it was between the hour of 8:30 and 9:50.

Q. Yes. I know. A. At Auburn.

Q. I am asking you if you wrote down on a single one of your inspections the exact hour that you made the examination, or if you waited until you got all through and then wrote all this down?

A. The Centralia case on September 2d was inspected about 6:00 A. M.

(Testimony of George B. Winter.)

Q. When you inspected that car at 6:00 A. M., was the road engine attached to the train?

A. I would not say at this time. I don't think it was, though.

Q. Go right along. What have you got in your book about 6:00 A. M. I have "First inspected at 6:00 A. M. while switching."

Q. What cause of action is that?

A. That is the fifteenth cause of action; fifteenth, sixteenth and seventeenth.

Q. Now, all of those cars in the fifteenth, sixteenth and seventeenth causes of action,—they were all inspected while the cars were being switched, were they?

A. They were inspected while the train was being made up. [80—45] What I mean by being switched is when they were being put into this train.

Q. In the fifteenth, sixteenth and seventeenth causes of action, the cars in the Centralia yard were being inspected while they were being switched in to the train?

A. Yes, sir, that is when the first inspection was made.

Q. So the road engine would not be attached?

A. You don't let me answer the question.

Q. I want you to protect yourself.

A. The answer to the question I wished to answer was that I first inspected these cars at 6:15 and again when they left at 7:15.

(Testimony of George B. Winter.)

Q. How close were you to the cars when they left at 7.15?

A. I was probably alongside of them.

Q. Where were you?

A. I was alongside of the train.

Q. When the train moved out? A. Yes, sir.

Q. You saw all of these various defects, did you? A. Yes, sir.

Q. All on your side of the train, were they?

A. Well, just a minute.

Q. You can answer that question. Have you ever testified in a single case that you did not stand and see the train move and that you saw all the defects?

A. I never have, no, sir. We saw the car leave.

Q. You can't tell whether there was two inches clearance or whether there was a four-inch clearance when you saw the train leave, could you?

A. I could. [81—46]

Q. Where were you standing when this train left the Centralia yards?

A. I was standing alongside of the train on the east and west passing track.

Q. On the east and west passing track? And all the defects were on your side, were they? Was Weeks on the other side?

A. All of the defects were not on the side of the train.

Q. Were you and Weeks on the same side of the train?

A. I think we were, yes.

(Testimony of George B. Winter.)

Q. Were you at Auburn? A. Not at all times.

Q. Well, when the trains pulled out?

A. It is according to how the defect came on the train.

Q. You don't know then? You don't know whether you were or not? A. Yes, I do know.

Q. The only examination, however, that you made of these cars at Centralia and the only examination that you made at Auburn was when they were being switched in and later you stood and saw the trains go by,—is that correct?

A. No, sir; that is not correct.

Q. When the train pulled out, was the train moving when you noticed the defects the second time? A. Yes, sir.

Q. Very well. Then, did you make more than one examination when they were making up the train,—switching the cars in,—did you make another examination after that before the train moved out?

A. We kept track of the cars while there in the train to see [82—47] whether they were going to be repaired or not.

Q. Answer my question, Mr. Winter, I asked you if you made any other examination of these cars after they were switched into the train other than to stand along somewhere along the track or road and see them move out in the train?

Mr. LIST.—If your Honor please, I submit that the witness started to answer that question.

The COURT.—This is cross-examination.

(Testimony of George B. Winter.)

Q. (Mr. WINDERS.) You can answer that "yes" or "no." A. Yes.

Q. Now, tell me,—taking your fifth cause of action,—where was that car that you examined somewhere between 8.30 and 9:50 when you examined it the second time? A. I don't know.

Q. Would you swear to this jury that you did examine it a second time before it moved out of that yard? A. Yes, sir.

Q. Have you got any record of it?

A. I was up and down this train many times before it left.

Q. What time did that train leave?

A. 9:50 in the morning.

Q. There were two other trains that left before ten o'clock that morning concerning which you testified you also examined the cars, from Auburn?

A. I don't recollect that I did.

Q. Well, you look at your records and see if you did not?

A. What is the question, please?

Q. I say, you have already testified that on this morning before ten o'clock there were either two or three other [83—48] trains that you were watching going out?

A. I did not file any suits on any other trains before this 9:50 train that morning at Auburn.

Q. What time did the train carrying car No. 67219 go out? A. What cause of action is that?

Q. The first cause of action. I will change that from ten to 10:20.

(Testimony of George B. Winter.)

A. That changes the question. What is the question?

Q. I will make it 10:20. What time did the train that you testified carried cars 67105 and 68327 go out?

A. I did not testify to car No. 68327.

Q. Didn't you testify as to the third cause of action? A. Yes,—that is right. 68327.

Q. What time did that train go out? A. 10:10.

Q. What time did the train carrying car No. 67219 go out? A. What cause is that?

Q. That is the first.

A. That train left at 10:20.

Q. You have testified that one train went at 9:50 with some of those cars, one at 10:10, and one at 10:20. A. Yes, sir.

Q. How long is the Auburn yard of the Northern Pacific?

A. The full yard is about two miles.

Q. Tell us what part of the yard the train carrying the car in your first cause of action departed from?

A. About opposite the yard office in the northern part of the yard.

Q. Which way did it go? Towards Tacoma?

A. Towards Tacoma. [84—49]

Q. All right. In which direction did the train that carried the cars,—those eight or nine that you have here in a bunch,—in what direction did that go? A. That train moved northward.

Q. That went towards Seattle, didn't it?

(Testimony of George B. Winter.)

A. A short distance, yes.

Q. That train was headed towards Seattle?

A. Yes, sir.

Q. When it went out of the yards it went out of the north end of the yard, didn't it?

A. Yes, sir.

Q. The other train went out along towards the south end of the yard? A. Yes, sir.

Q. What part of the yard did the train in the third cause of action go out of?

A. Track No. 2 near the scales. These trains all left from the same neighborhood,—right in the north end of the yard.

Q. Which direction did that train go?

A. It went east.

Q. How long did it take this train with all these log flats that came towards Seattle to move past you? Did you actually see it go out of the yard?

A. Yes, sir.

Q. How long did it take for that train to go by?

A. Probably ten minutes.

Q. That would bring you up,—if it started out at 9:50,—bring you up to ten o'clock, wouldn't it?

A. Yes, sir. [85—50]

Q. Then where did you go?

A. Well, we probably,—let us see,—we went over to track No. 2 near the scales about 100 feet,—less than 500 feet over there to another track.

Q. You went over to see another train go out, did you? A. Yes, sir.

Q. How long did it take that train to go out?

(Testimony of George B. Winter.)

A. I would not say. Probably a space of five minutes in pulling it by you.

Q. So if it started at 9:10 it would be 9:15. The other train went at 10:20? A. Yes, sir.

Q. Did you go over there and watch it go out?

A. Yes, sir.

Q. At least during the time you watched these trains go out you did not have these cars under your surveillance did you? A. No, sir.

Q. How many cars were there in those trains?

A. Probably 150 altogether.

Mr. LIST.—You mean in each train?

The WITNESS.—In all three trains.

Q. (Mr. WINDERS continuing.) Probably 50 in each train?

A. In about that neighborhood.

Q. Getting back now to these brake staffs, which I want to finish up with first, as near as you have given thus far, you have testified that you and Weeks tried those once. Will you say that you tried them a second time?

A. No, I would not say.

Q. Now, you would not say that after these cars were switched,—[86—51] being switched into the train,—that you saw those cars to pay particular attention to them until the train moved them out of the yard, would you?

A. Not particular attention, no.

Q. No.

A. We saw them, however, many times.

Q. Now, this brake staff,—so the jury can un-

(Testimony of George B. Winter.)

derstand this matter,—they probably know,—that is metal, isn't it? Cast-iron shaft?

A. Well, no; it is supposed to be steel, as a rule.

Q. All right. That is the shaft on the end of the car that the brakeman takes and winds up?

A. Winds up.

Q. When do you use those handles? When are they used in modern operation?

A. What is that question?

Q. I say when is a hand brake used in the modern operation of a railroad?

A. At the present day it is probably used principally in switching or spotting of cars.

Q. As a matter of fact, this same law that you are sworn to enforce requires that all trains be hooked up with air so they can be controlled by the air brakes, doesn't it? A. Yes, sir.

Q. Now, you have testified that on four or five of these cars this brake lever was either loose or something wrong with it,—the lever that you pull up— A. Uncoupling lever.

Q. In other words, there is a lever extending out over the [87—52] end of the cars,—the jury have probably seen,—that you can grab hold of with your hands and uncouple the cars?

A. Yes, sir.

Q. Did you inspect and find that situation first while those cars were being switched into the train?

A. I think the particular counts were probably in the train. I would have to—

(Testimony of George B. Winter.)

Q. Could you look at your book and see? The first one was the second cause of action. That is car No. 61585 from Auburn.

A. That uncoupling lever was missing.

Q. What time did you find that uncoupling lever missing? What time of day?

A. About 9:45 A. M.

Q. Let us see your record on the 9:45?

A. Here is the inspection record right here (indicating).

Q. So you did examine that car at 9:45?

A. Here is the time the train leaves (indicating). Here is the engine number.

Q. You have got the time on a lot of these, haven't you? Here is one at 9:15.

A. Let us see.

Q. This hour on the book that you have on here, —that is the hour that you actually made the discovery of the defect, is it?

A. In that particular case.

The COURT.—Speak louder so the jury can hear you.

The WITNESS.—In that particular case. [88—53]

Q. (Mr. WINDERS.) I say the hour that is shown on here is the hour that you found the particular defect in that particular car?

A. Yes, sir.

Q. So that on that car you found it at 9:45?

A. Yes, sir.

(Testimony of George B. Winter.)

Q. Would you say that the road engine was hitched onto the train at that time?

A. I would not attempt to testify as to that definitely, no. I think it was.

Q. Anyhow, at the time you found that it was at 9:45? A. Yes, sir.

Q. What was the next car you inspected after that one that you are suing for? Have you got any that you inspected after 9:45?

A. I think some of these seven or eight counts in that train 930 were inspected after that time, because the notes show that the inspection continued up until the time that the cars left; and that was at 9:50.

Q. So that after, for instance, you had seen this lever out of order you would make your note of that right then, would you, in your book,—stop and write it?

A. If I am permitted to answer, we make a first inspection and then at the time the train leaves.

Q. You have told the jury two or three times that you watched the train go out of the yard. I am asking you if when at 9:45 you found this lever lost or gone, did you right then before you moved to another car write that in your book?

A. Yes, sir. [89—54]

Q. Let us take that particular cause of action. Just give the jury an idea. They will want to know how busy you were out there. Is that the one here (indicating)? A. Yes, sir.

(Testimony of George B. Winter.)

Q. Just look at the one,—you have got a drawing here on the back and one thing another of that kind,—here is inspection 945. You think that after that before the train went out you inspected five or six more cars?

A. I would say “yes” to that question.

Q. You would have five minutes to do that,—the train leaving at 9:50? A. Yes, sir.

Q. So that you did not have very much time to go back and test these things two or three times, did you, before that train went out?

A. Not after 9:45 I would not, no.

Q. Have you got any record of having seen that car and inspected it before 9:45?

A. No, sir. I am speaking of the other car. I was speaking of the other cars when I replied that we had time to inspect them before the train left at 9:50, because they had been in the train since 8:30.

Q. Well, you say you don’t know whether you inspected them at 8:30 or 9:30. You say you think that after 9:45 you inspected six or eight of them? Now, we will take this lever that comes out here, and if that is in good working order all the brakeman has to do is to raise that up and uncouple the car? A. Yes, sir.

Q. Counsel here went into great detail with you as to the [90—55] effect if that lever was out of order that there would be only one way for a man to get that uncoupled and that would be to go in between the car and work it open with his hands—did you so testify? A. Yes, sir.

(Testimony of George B. Winter.)

Q. Isn't it a fact that on the other side of the car connected with this there is another uncoupling lever that works the same coupling?

Mr. LIST.—That is objected to, if the Court please, for the reason that the law requires that the coupler on each car shall be operated by its own mechanism. I will be glad to quote a number of authorities on that point.

The COURT.—I sustain the objection.

Q. (Mr. WINDERS.) Did you testify that it would be necessary in order to uncouple a car in which this lever was lost or broken for a man to go between the cars? A. I did.

Q. Is it not a fact that you can go on the other side of the car? Is there not an uncoupling lever on the other side of the car to which this particular car was attached that will uncouple the car without going between the cars?

Mr. LIST.—That is objected to, if the Court please.

The COURT.—I don't see that it is material, but if it is testing the memory of the witness or his observation or his credibility, I will overrule the objection.

A. You mean on the same car or the adjoining car? [91—56]

Q. (Mr. WINDERS.) My question was if on the car to which this car was coupled there was not a lever which could be worked which would uncouple the cars,—which would make it unnecessary for a man to go between the cars?

(Testimony of George B. Winter.)

A. It would be necessary for him to go over on the other side of the train to get a lever on the adjoining car.

Q. Naturally if it was on the other side he would have to get over there? A. Yes, sir.

Q. I am asking if there was not a lever on the other side of the cars that could be operated to make this uncoupling without a man going between the cars?

A. In this particular case I don't know.

Q. You don't know?

A. Because I did not make a record of any adjoining car as to any defects.

Q. You did not make any record. Did you go up both sides of this train? A. Yes, sir.

Q. You read here to counsel the number of cars on either side of these cars? A. Yes, sir.

Q. You have access to all of the company's records, have you not,—the Interstate Commerce Commission? A. Yes, sir.

Q. Yes, any time you want to you can go in to the company's yard and get the manifest of a train which will show you the location of any and every train and all the cars? A. Yes, sir.

Q. So you still say to this jury that you don't know whether [92—57] or not this car could have been uncoupled by going on the other side of the train?

A. I did not file information for suit on any—

Q. You answer my question, Mr. Winter, please. I say you still tell this jury that you don't know

(Testimony of George B. Winter.)

whether or not they could go on the other side and use the lever on the other side and uncouple these cars?

Mr. LIST.—If the Court please, in order to save time, if counsel wants to raise any legal question on which he wants a ruling, I will make the admission that he could get on the other side of the train and use a coupling on the other car and make the uncoupling, if there is any dispute on that.

Mr. WINDERS.—There is going to be a very serious dispute on the evidence in this case. It seems to me that without interruption I have a right to examine this witness.

The COURT.—Objection overruled.

A. I don't know.

Q. (Mr. WINDERS continuing.) Please refer to your eighth cause of action that alleges that the hand brake wheel was missing. Did you make a careful inspection of that car?

A. Sufficient to know that the wheel was missing.

Q. Did you get up on the car?

A. I would not say that I did.

Q. As a matter of fact, wasn't that car defective in a great many other particulars?

A. I don't know. [93—58]

Q. The only thing that you saw wrong with it was that this steel shaft was off.

A. That is the part of the car that I inspected, was the safety appliance.

Q. You don't know anything else wrong with it at all? A. No, sir.

(Testimony of George B. Winter.)

Q. What time of day did you inspect that car,—that is on that same train?

A. That is between 8:30 and 9:50.

Q. You don't know whether that was after 9:45 or before? A. I would not state, no.

Q. Will you turn to your thirteenth cause of action,—I think we have gone over the brake staff cases now and these couplers,—now, we have got one in which you say the handholds of the right-hand side of the car,—right-hand side of the "A" end of the car was fouled by the lading thereon.

A. Yes, sir.

Q. What kind of a car was that?

A. Northern Pacific flat-car.

The COURT.—What handhold was that?

A. The handhold on the right-hand side of the end as you face the end of the car.

Q. (Mr. WINDERS continuing.) As you face which end of the car?

A. The "A" end of the car.

Q. I believe you said the "A" end was the one that did not have the brake and the "B" end was the one that had the brake?

A. Usually in the majority of cases that is true.
[94—59]

Q. You so testified, didn't you? A. Yes, sir.

Q. As a matter of fact, the "B" end of the car is the end through which the air cylinder runs?

A. That is also where—

Q. Isn't that always the "B" end of the car?

A. Yes, sir.

(Testimony of George B. Winter.)

Q. And the "B" end of the car may be the end that the brake staff is on and the brake staff might be on the "A" end? A. Not in this case; no, sir.

Q. I am not talking about this case. I say you testified here that the "B" end of the car was the end the brake staff is on, and now you have just testified that the "B" end is the end through which the air cylinder runs. Isn't it a fact that on many cars the brake staff is on the "A" end instead of the "B" end? A. It is not.

Q. So you still say that the brake staff is always on the "B" end?

A. To this extent that there are a few eastern railroads that have double brake staffs,—the Pennsylvania and the B. & O.

Q. Where a car only has one brake staff, it is on the end through which the air cylinder runs? That is your understanding?

A. That is my belief.

Q. Now, tell the jury,—we will assume that this is the top of a flat-car right here (indicating). Where is this handhold? How far below the floor of the car if [95—60] you face the end of the car?

A. It would be in the center of the car. There is a handhold on one side.

Q. It says the handhold on the right-hand side of the "A" end of said car?

A. That is this right here (indicating).

Q. How far now below the face of the deck of the car?

(Testimony of George B. Winter.)

A. In this particular case it was up near the top of the deck of the car.

Q. You say it was fouled. So you are now complaining, are you, that the grab-iron was too close to the deck of the car?

A. The log on this car was out—

Q. How close to the top or the level of this car was the grab-iron?

A. Sufficient enough so that it did not have any clearance.

Q. Then it is your testimony, as I understand it, that this grabiron extending out here something like that (indicating) was level with the top of the car,—is that right? A. Practically so.

Q. What kind of bunks did this log car have on it? A. I don't know.

Q. Did you make any record?

A. I did not check it up.

Q. Did it have bunks on it? A. I don't know.

Q. As a matter of fact, you know that on top of the face of that car the minimum or smallest log bunk upon which those logs ride are at least six inches above the bottom [96—61] or floor?

A. I would not say of this car.

Q. Did you ever see logs in commercial traffic on the Northern Pacific system handled on these flat cars where the bunk did not lift the logs at least six inches above the floor of the car?

A. Thousands of them.

Q. Where? A. In my own inspection.

(Testimony of George B. Winter.)

Q. Do you say there is any operated on the Northern Pacific to-day,—cars without any log bunks?

A. I did not so state.

Q. Do you know they were any cars operated on the Northern Pacific system during the months of August and September, 1922, that did not have log bunks on them? A. I don't know.

Q. But it is your testimony to this jury that there was a log extending over and the end of that log did not clear two inches of this handhold,—went down within two inches of this handhold?

A. That is my contention.

Q. Did you measure it? A. I did not have to.

Q. Was Weeks with you? A. Yes, sir.

Q. How long did you stop at that car?

A. Long enough to make notes relative to its condition.

Q. You did not keep your eye on that car when it went out of the yard, did you?

A. Yes, sir. [97—62]

Q. Saw that particular car? A. Yes, sir.

Q. Did you write anything down in your book as it went by you? A. I don't remember.

Q. I wish for the benefit of the jury, and particularly for the Northern Pacific men, you would explain to the jury how you could test these brakes that you say could not be operated, without getting up on top of the car?

A. The one with the brake wheel missing I knew could not be turned. The other cars with the bent brake staffs,—the brake staffs were turned over by

(Testimony of George B. Winter.)

the logs on them to the extent that you could not turn them or wind the chain on the shaft which sets the brake.

Q. You are testifying now absolutely free and clear without referring to any record, are you not?

A. To the extent that we state that to our best knowledge it shows an inoperative brake. Otherwise I would not—

Q. Why did you tell counsel on direct examination that you tried to operate these brakes and they would not operate? A. Because I did so.

Q. Would you tell this jury and tell me and these other men here who think they know a little something about railroading, how you could operate or attempt to operate that brake without getting up on the car?

A. If I may be permitted to explain—

Q. Yes, get right down and explain it.

Mr. LIST.—May I suggest to the Court if there is going to be any serious contention on that [98—63] point, that the jury be allowed to go down in the railroad yards and inspect a car?

Mr. WINDERS.—As I said several times, there is a serious contest of everything in this case.

The COURT.—If railroad counsel can advise the Court at five o'clock where a suitable car can be inspected by the jury, the bailiff can take them down and let them see what you are talking about. It should be explained to them. Possibly it better be deferred until the close of all the testimony.

Mr. WINDERS.—I will try to get a log flat if I can and the jury can go and examine it.

(Testimony of George B. Winter.)

The COURT.—At the close of all the testimony and before the argument, if it is then in shape so they can see a car, I will let them go.

Mr. LIST.—Not only as to this character of defects, but any other in which the same question may come up, or a similar question.

The COURT.—If it can be arranged.

Q. (Mr. WINDERS continuing.) Now, on your fourteenth cause of action,—car No. 64036 at Centralia,—we will get down to this broken sill step,—I think you first testified that there was no sill step on the car, didn't you? A. In effect there was not.

Q. What does your memorandum say?

A. Sill step was missing and broken off.

Q. When did you write "broken off"?

A. During the time of the inspection.

Q. What time did you inspect that car? [99—64] A. About 8:30 in the morning.

Q. What time did the car leave Centralia?

A. 10:30.

Q. You have got down there 8:30, have you, in your book? A. Yes, sir.

Q. That would be the sill step on the end of the car, so as the train went along there would be a car here, would be a car here, and here would be another car (indicating). This step would be in between here (indicating)—is that correct?

A. The step is not in between the cars. It is on the side.

Q. On the side? A. Yes.

(Testimony of George B. Winter.)

Q. Do you know on which side of this car from the compass direction this step was off?

A. I would not attempt to say.

Q. Are you willing to swear on your oath to this jury that when that car went out of there, as you stood and watched that train go by, it was on your side?

A. Yes, sir.

Q. You would swear to that?

A. Yes, sir.

Q. Can you tell which side it was?

A. You asked me about the compass direction.

Q. North, south, east or west?

A. Track No. 6 in Centralia yard runs generally north and south.

Q. We will consider it runs north and south. Now, were you on the east or the west side? [100—65]

A. I would be on the west side.

Q. That is, you were over towards the roundhouse, were you?

A. This was not near the roundhouse.

Q. Was not near the roundhouse?

A. No, sir, track No. 6 in the Centralia yard is not near the roundhouse.

Q. How far was that from the depot?

A. Quarter of a mile, probably.

Q. Did this train then go on out past the depot?

A. Yes, sir.

Q. What did you do when that train went by?

Go to look at some more cars?

A. I paid particular attention to this particular

(Testimony of George B. Winter.)

car as to whether or not the car was in the same condition as when we first found it.

Q. After this train had gone by and you paid this particular attention, what did you do then after the train had gone by? Go to inspect other cars?

A. I don't think we filed any violations that day.

Q. I asked you if you went to inspect any other cars? A. Oh, yes.

Q. You stayed down in the yard and inspected cars, did you? A. That is what I was there for.

Q. Doesn't the yard of the Northern Pacific practically extended up to the depot,—how far did you say it was from where you were to the depot?

A. About a quarter of a mile.

Q. Doesn't the yard extend up to the depot? [101—66] A. Yes, beyond the depot.

Q. You did not see that car for some quarter of a mile before it got out of the yard, did you?

A. We saw this train pull out on the main line and proceed southward.

Q. You did not see that car get out of the yard, though, did you?

A. The yard, in the sense of leaving the train yard, yes.

Q. Did you see that train go beyond the limits of the yard? A. The repair yard, yes.

Q. Well, was there any particular repair yard, at that time?

A. The repair yard did not extend to the depot.

(Testimony of George B. Winter.)

Q. Was there any repair yard at that time in Centralia, or any particular repair tracks in Auburn at that time? A. Yes, sir.

Q. Weren't they making repairs up even as far as the depot where those trains went out in Centralia? A. No, sir.

Q. How often were you in Centralia—

A. How?

Q. How often were you in Centralia during this strike period?

A. I make a periodical trip to Centralia every sixty or ninety days.

Q. Just for the benefit of the jury, what is the extent of your territory

A. Western Montana, Washington, Oregon and Idaho.

Q. Did you stay in Centralia more than this one day?

A. I cannot say as to that without referring to the travel [102—67] records.

Q. You don't know very much about where they were repairing cars during this strike period, either in Auburn or Centralia, do you?

A. I think I do.

Mr. LIST.—I am going to ask you to bring your travel records up, so as to satisfy counsel on that point.

The WITNESS.—Yes, sir.

Q. You know things were not normal at Auburn at that time? A. I do.

(Testimony of George B. Winter.)

Q. You know things were not normal at Centralia at that time? A. I do.

Q. You know that ordinarily when operations are normal all cars are supposed to be repaired before they are switched into the outgoing train, are they not, in ordinary railroad operations?

A. That is the intention and endeavor.

Q. That is the intention?

A. It is not always done.

Q. No, it is not always done. We are not all infallible. But the general idea is to-day and it was before this emergency that cars having anything wrong with them in the way of bent handholds or brake levers missing,—it is not uncommon to find when a car comes in that a brake lever is out of order in the yards? A. No, sir.

Q. Hundreds of them. These steps and one thing and another, they ship them to Centralia and around by the hundred, [103—68] don't they?

A. Yes, sir.

Q. In ordinary operation with a full crew of car repairers, when traffic is normal, the common practice is to straighten these handholds and put on these drawbars and these connecting levers before the car is switched into the train?

A. Yes, sir.

Q. Were you over in Idaho during this strike period? A. Yes, sir.

Q. Were you in Montana during the strike period? A. Yes, sir.

Q. Were you in Oregon during the strike period?

(Testimony of George B. Winter.)

A. Yes, sir.

Q. Were you in Eastern Washington?

A. Yes, sir.

Q. Your work is not confined alone to our company, but you take in other roads?

A. All the lines engaged in interstate commerce.

Q. Now, I think that leaves this C. G. W. car. That is this car that you found down on Hanford Street on September 10th. It is C. G. W. 13330. It is a car delivered on Hanford Street transfer by the Great Northern for the Fisher Flouring Mills. That car was loaded, wasn't it, Winter?

A. Loaded with wheat.

Q. Do you know where it was consigned?

A. No, sir.

Q. Consigned to Seattle?

A. I don't know. [104—69]

Q. What time of day did you see that car?

A. We first inspected it at 8:00 o'clock in the morning.

Q. Where was it at that time?

A. It was on track No. 4 in the Hanford Street interchange yard.

Q. You mean the track on which the railroads put cars to go from one line to the other?

A. Yes, sir.

Q. Do you know over what road this car had been hauled? A. Great Northern.

Q. Over the Great Northern. They were putting it on the interchange for the Northern Pacific to deliver it to some place? A. Yes, sir.

(Testimony of George B. Winter.)

Q. You saw this car at 8:00 o'clock?

A. 8:00 o'clock in the morning.

Q. Who was with you? A. Mr. Weeks.

Q. Your friend Weeks here. What did you have,—a tape?

A. No, sir; we carry a stiff folding rule.

Q. You had it with you that morning?

A. We always carry it with us when we go down.

Q. At what time did you measure that car?

A. 8:00 o'clock.

Q. Did you measure it more than once?

A. We made several measurements.

Q. When did you measure it the second time?

A. My notes show—

Q. When did you measure it the second time, is the question?

A. I cannot answer the question. I don't know.

[105—70]

Q. How many times did you measure it?

A. Several times.

Q. Does your record show how many times?

A. It shows several times.

Q. It was on the interchange track the first time? A. Yes, sir.

Q. The second time? A. Interchange track.

Q. The last time?

A. On the interchange track.

Q. Standing at the same place?

A. I would not say as to that.

Q. Would you say it was standing at the same

(Testimony of George B. Winter.)

place when you measured it the last of these several times as it was the first?

A. I don't know. My notes don't show that. I inspected those cars. I can't remember.

Q. I am going into this matter, because conditions were not normal at this time, were they?

A. No, sir.

Q. And the work was not being carried on the way that it ordinarily was carried on? Now, how long did you stay around where that car was? What time did you leave the location?

A. I think we left with the transfer when it went over to the Northern Pacific yards.

Q. When it went over to the Northern Pacific yards. What time was that? A. 8:30 A. M.

Q. 8:30 you saw it taken from this transfer into the [106—71] Northern Pacific yard?

A. Yes, sir.

Q. And that is the last you saw of it?

A. Yes, sir.

Q. Were there a good many cars on this transfer? A. Not very many.

Q. Do you know about how many? Well, anyhow you would state there was a car on either side of it, wasn't there? There was a car on either side of it? A. Yes, sir.

Q. Were those cars all going to the Northern Pacific?

A. The Northern Pacific hauled those other three cars with this into the Northern Pacific yards.

Q. If it was necessary for the Northern Pacific

(Testimony of George B. Winter.)

to get either one of those cars,—the car that was behind this,—they would have to move this car into the yard, wouldn't they?

A. Not necessarily. They could switch it out on the transfer.

Q. Is there any place to repair that car on the transfer? A. Yes, sir.

Q. What do you mean by the transfer?

A. By the ordinary term, it is meant as a connection between two lines where they interchange their equipment. Cars are held on certain tracks and then picked up by connecting lines. That is called an interchange or transfer movement.

Q. In other words, all this is railroad tracks, isn't it, near there? A. Yes, sir. [107—72]

Q. In other words, you have a track going along here (indicating), if this is the Great Northern track, if you get that over to us they put a switch in there and build out there some rails over here, and then on the other end this track will probably connect with the Northern Pacific track (indicating). This car was set by the Great Northern that brought this in on their own track,—they set it on these other rails with some other cars, and what you saw the Northern Pacific do was to hook on to those cars and take them off of that transfer and take them into the Northern Pacific yards,—that is what you saw them do?

A. This particular yard is segregated from the Northern Pacific train yards here (indicating). The interchange yard is set aside for that purpose

(Testimony of George B. Winter.)

between the several different lines. Cars are put on certain tracks for certain railroads, and they are hauled from the connection, which was the movement in this case.

Q. The movement in this case consisted of the Great Northern bringing this and some other cars in on a railroad track to which the Northern Pacific had access, and the Northern Pacific hooking on to those cars that they set in there for the purpose of taking them into the Northern Pacific yard,—is that the movement? A. Yes, sir.

Q. What facilities were there along this transfer track for the purpose of raising up this draw bar that was an inch too low, or an inch and a half?

A. I don't know what facilities you have there.

Q. You know there wasn't anything there but some naked ties [108—73] with rails on the top of them and some switches at either end,—isn't that all there was on those tracks?

A. They have car inspectors placed there and some materials at times.

Q. Cars were repaired on the transfer track?

A. Yes, sir.

Q. You have seen them repaired there, have you? A. Yes, sir.

Q. During this strike period?

A. I would not so state.

Q. That track is right along Whatecom Avenue, isn't it?

A. Yes, sir, that is a street that runs north and

(Testimony of George B. Winter.)

south along the bay front. I think that is Whatcom Avenue.

Q. Were you around very much during the strike period? A. Quite a good deal.

Q. Were you around when things were at their height in Auburn?

A. I guess I was. I guess it was the height of it on the day in question.

Q. Do you think it would be advisable from the standpoint of either the railroad company or the public to have a crew of men out along a public street repairing cars at that time?

A. This interchange track is not on a public street.

Q. I say along a public street.

A. Just let us have that question again.

Q. Do you think it advisable from the standpoint either of the railroad company or the general public in the city of Seattle to have had a crew of car repairers, who [109—74] of course would be taking the place of the strikers working on cars as close to Whatcom Avenue as was this transfer track?

Mr. LIST.—That is objected to, if the Court please.

The COURT.—Objection sustained.

Q. (Mr. WINDERS continuing.) I want to go back to this grabiron. My attention has been called to this grabiron with the log coming closer than two inches from it on the end of this car. To what is this grabiron attached on the end of the car? A. The endsill.

(Testimony of George B. Winter.)

Q. Is there anything above the endsill?

A. The decking of the car as a rule.

Q. How thick is the decking of the car?

A. Usually two inches, or two and a half.

Q. The regulation is that there must be two inches clear,—is not that the Federal regulation?

A. Yes, sir, the minimum clearance of two inches.

Q. I wish you would look at your seventeenth cause of action. I want to be sure for the purpose of the record; would you give the car numbers that were on either end of that car number 63839?

A. N. P. flat car 65642 and 62213.

Q. That is your testimony as to the arrangement of the cars as the cars actually went out of the station? A. Yes, sir.

Q. And you actually saw and took those numbers yourself? A. Yes, sir.

Q. Turn to your cause of action 14 and give me the number of the engine that you claim pulled those cars out? [110—75] A. 1263.

Q. You are sure of that? A. Yes, sir.

Q. You are sure that is the engine that actually started the train in which these cars were out on the road? A. Yes, sir.

Q. Now, your cause of action No. 12,—I suppose you were up by the engine when it started, were you, Mr. Winter?

A. Sufficient enough to get and identify the train.

Q. Were you standing up by the engine when the engine started on these trains?

(Testimony of George B. Winter.)

A. I would not say that I was.

Q. Where would you stand? In the middle of the train or up along the engine or where?

A. I would stand where the first car in the train back of the engine was located with defects.

Q. Would that be the last car you would inspect? Would that be the way you were working?

A. I don't understand your question.

Q. Would that be the car you would last inspect in the particular train?

A. Why, we would inspect all the cars that we had noted defective within the train.

Q. At Auburn where you have got one accurate record of time,—you have got down 9:45,—you say after 9:45, between that and 9:50, you probably examined six or eight cars in that five minutes? Were those cars up toward the engine? Was the last car in your inspection before the car went out up towards the engine or the other way? [111—76]

A. I would not state now.

Q. You don't know whether you were standing in the middle of the train when these trains started or up along the engine or near the rear?

A. I was about where the cars were defective,—wherever those were located.

Q. What car have you in that twelfth cause of action? A. 65296.

Q. Now, what train do you claim that car left Auburn in? A. Train 930, engine 1784.

Q. Train what? A. Train No. 930.

(Testimony of George B. Winter.)

Q. The train left what time? What engine and what train?

A. Train No. 930, engine 1784; 9:50 A. M. on 8-31.

Q. You are testifying that this car in the twelfth cause of action,—65296,—went in a northerly direction from Auburn, did it? A. Yes, sir.

Q. And it went in the same train that these other cars that you have enumerated here,—several other cars that you have testified about? A. Yes, sir.

Q. What was the car numbers on either side of that?

A. The twelfth cause of action,—on the “A” end was 62467. On the “B” end 65994.

Q. If, as a matter of fact, that car instead of going north went to Tacoma on that day,—did actually go to Tacoma, why it must have been taken out of that train that day?

A. Not necessarily. It might have been up and been unloaded [112—77] and come back.

Q. In other words, the train might have come on through Seattle and been unloaded and gone back to Auburn and then sent on over to Tacoma that same day? A. Well, this particular car.

Q. That would be pretty good service, wouldn't it?

A. Yes, it would.

Q. I think that is all.

A. That is, if it came to Seattle.

Redirect Examination.

(By Mr. LIST.)

Q. When you testified as to the number of these

(Testimony of George B. Winter.)

different trains, where did you get that information?

A. From personal observation around the yard.

Q. But as to the number of train,—that is you speak of the train as being No. 930, engine 1784,—just state to the jury where you got that information as to the number of the train.

A. Either from the conductor or engineer at the time they left.

Q. Would the engine itself have any number?

A. Not indicative of the number of the train. There would be an indication as to whether it was regular or extra.

Q. In making your record from which you have refreshed your memory, did you make that record as you were going along from time to time, or did you wait and make the record at one time?

Mr. WINDERS.—I object to that as not proper redirect examination. [113—78]

The COURT.—Objection overruled.

A. I make it from time to time.

The COURT.—You did not answer that last question. You answer that you make it from time to time. The question was did you make that record as you would go along from time to time or did you wait and make the record at one time.

A. I made it from time to time—various times.

Q. (Mr. LIST continuing.) Referring to the flat cars which you testified as having defective hand brakes, was it necessary to get on those cars in order to find out whether the handbrake was inoperative?

(Testimony of George B. Winter.)

Mr. WINDERS.—I think he has already gone into that. It is cross-examination of his own witness.

The COURT.—Objection sustained.

Mr. LIST.—Exception, please. I have not gone into that, Mr. Winders.

The COURT.—Mr. Winders asked if it was necessary, and he stepped down to the table and gave some illustration. I think he took two pens and went down and showed how the brake staff was operated.

Mr. WINDERS.—That is what he started, but he did not finish.

The COURT.—I will overrule the objection. I thought he explained it.

Q. (Question read.) A. It was not.

Q. (Mr. LIST continuing.) Mr. Winter, did you make records of all cars that you inspected this morning, or did you [114—79] simply make a record of what cars you found with what is known as penalty defects?

Mr. WINDERS.—I object to that question as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

A. At the same time we make a record of all cars that carry safety appliance defects. It is only those that carry defects that we file information and send to the Commission.

Q. (Mr. LIST.) On this particular occasion,—the cars that you testified to, were those the only records that you made at that time?

(Testimony of George B. Winter.)

A. No, at Auburn on the 31st of August, I think I have—

Mr. WINDERS.—I don't know what the purpose is, but it is clearly incompetent.

The COURT.—Objection sustained.

Mr. LIST.—I will come to that in another way, your Honor.

Q. Mr. Winter, you were asked if you notified any of the officials around there,—some of them being named,—as to having found these cars defective, and your answer was that you did not.

A. I did not.

Q. Now, will you state to the Court and jury why you did not do that?

Mr. WINDERS.—I object to that on the ground that it is immaterial why he did not.

The COURT.—Objection overruled.

A. Well, a good many times, as in this case, we find that it does not do any good. [115—80]

Mr. WINDERS.—I move to strike that answer and that the jury be instructed to disregard it.

The COURT.—I will deny the motion.

Q. (Mr. LIST, continuing.) State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment?

Mr. WINDERS.—I don't think that is material. I object to it on the ground that it is not material.

Mr. LIST.—We are trying to show that we have been more than fair with you.

The COURT.—Objection sustained.

(Testimony of George B. Winter.)

Mr. LIST.—I offer to prove by this witness that on August 31 he reported to one of the officials of the Northern Pacific of having inspected about two hundred cars and having found approximately fifty of them in a defective condition; that he gave to the Northern Pacific official the record showing the individual numbers of those cars found defective.

Mr. WINDERS.—Now, of course, counsel knows that is not competent. I object to it. We deny the allegation.

Mr. LIST.—You opened the door.

Mr. WINDERS.—I did not open the door.

The COURT.—I permitted Mr. Winders' original question as to reporting to the officials of the railroad company, and Mr. Winders on cross-examination had a right to show, if he could, [116—81] any conduct on the part of the witness from which he might argue that it was inconsistent with his testimony. You would have a right on redirect to explain why he did not make the report on those particular cars, in order to explain away the conduct that Mr. Winders was probably preparing himself to argue as inconsistent with his testimony; but you could not go into other cars.

Mr. LIST.—He has answered that question, which your Honor permitted, that he found out it did not do any good.

The COURT.—I sustain the objection to your offer. The jury are instructed to disregard any statement or allusion to any other cars found defective and reported.

(Testimony of George B. Winter.)

Q. (Mr. LIST continuing.) It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

Mr. WINDERS.—I object to that, on the ground that it is absolutely immaterial.

Mr. LIST.—I understand that counsel raised the question of fairness.

The COURT.—I sustain the objection.

Q. (Mr. LIST continuing.) Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed [117—82] out defects to you upon which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the Northern Pacific did not accuse you of being too fair to the Northern Pacific?

Mr. WINDERS.—I object to that as having nothing to with the issue. My question was leading up to the question as to whether or not those men actually saw those defects, or whether they were told about them by some disgruntled employees.

The COURT.—We have only got a limited time to finish this case. I sustain the objection.

Mr. LIST.—Exception.

The COURT.—Exception allowed.

Q. (Mr. LIST.) Mr. Winter, when these trains

(Testimony of George B. Winter.)

started you stood there observing the cars that were defective. State whether or not you only stood there for the purpose of observing the movement of the defective cars, or whether you stood there until the whole train went out?

Mr. WINDERS.—I object to that as leading and suggestive.

The COURT.—Objection overruled.

A. We stood there and observed whether or not the particular cars that were defective were leaving in the train.

Q. Now, Mr. Winter, you testified a few minutes ago at the request of Mr. Winders about the clearance of the handhold on the end of the car,—the minimum being two [118—83] inches. I don't know whether the jury understood you to mean that the two inches must be out from the end of the car or that it must be two inches below the top of the deck of the car.

A. I mean that the clearance of the handhold should have two inches all around the full length of the handhold around the bar that is used as a handhold.

Q. You mean extending out from the end of the car?

A. Extending out from the end of the car as well as on top.

Q. Would that mean that the two inches would be both out from the end sill and two inches below the top of the car? A. Not necessarily, no.

Q. That is just what I want to get at,—what you

(Testimony of George B. Winter.)

meant when you said it had to have two inches clearance?

A. The handhold has to have two inches clearance.

Q. From what?

A. From the end of the car, or any part of the end of the car.

Q. Just out from the end of the car? A. Yes.

Q. But the handhold itself could be at a level with the deck of the car?

A. Yes, it might be applied even with the top of the decking.

Mr. LIST.—I have an offer to prove that I want to make later on when the jury is not here. May I reserve that, your Honor?

The COURT.—Yes, sir; at five o'clock you may make your offer. [119—84]

Recross-examination.

(By Mr. WINDERS.)

Q. This handhold that counsel has asked about,—my understanding of the law is that there must be two inches all around that handhold in the clear,—is that true? A. Yes, sir.

Q. So it must not only be two inches out here (indicating), but it must be two inches out here (indicating), and must be two inches from the obstruction on top?

A. If there is an obstruction there, yes.

Q. That is what you testified to in this case. Isn't that what you are suing us for, that it did not have two inches clearance on top?

A. It did not have that clearance on top.

(Testimony of George B. Winter.)

Q. That is what you are suing for?

A. Yes, sir.

Q. In other words, my understanding is that it is your contention that there was a log extending over the end of this car so that it came within two inches of the grabiron?

A. Came on the grabiron. The grabiron may be applied up on the decking.

Q. Was it applied up on the decking?

A. I would not say. It was applied up high enough so that it was blocked by this log that came down over.

(Witness excused.) [120—85]

Testimony of William E. Weeks, for Plaintiff.

WILLIAM E. WEEKS, produced as a witness on behalf of plaintiff, have been first duly sworn, testified as follows:

Direct Examination.

(By Mr. LIST.)

Q. Mr. Weeks, where do you live? A. Tacoma.

Q. What is your business?

A. Inspector for the Bureau of Safety, Interstate Commerce Commission.

Q. Were you with Mr. Winter at Auburn on August 31, 1922 and later at Centralia on September 2, 1922, and at Seattle on September 7, 1922?

A. Auburn and Centralia, yes, sir.

Q. How long have you been with the Commission?

A. About thirteen years.

(Testimony of William E. Weeks.)

Q. Prior to that time were you in the railroad service? A. Yes, sir.

Q. What capacity? A. I was engineer.

Q. For how long?

A. About ten years before coming out here.

Q. Did you inspect all these cars that Mr. Winter testified to? A. Yes, sir.

Q. Did you make a personal record of what you saw personally? A. Yes, sir.

Q. Did you see these cars leave in the trains that Mr. Winter testified to? A. Yes, sir. [121—86]

Q. Referring now to the first cause of action, Northern Pacific 67219,—just state briefly what you found its condition to be.

Mr. WINDERS.—I understand, Mr. Weeks, that you cannot testify except by referring to your record.

The WITNESS.—What is that?

Mr. WINDERS.—You have not any independent recollection outside of your records?

The WITNESS.—I have not. N. P. flat car 67219—

Q. (Mr. LIST.) Just state what its condition was when you first saw it and when it went out in Extra South 1263.

A. It had a handhold bent on the “B” end, bent in against the sill opposite the lever, with no clearance.

Q. What did you find the condition of Northern flat car 61585 to be?

A. Had an undercut tower lever missing on the

(Testimony of William E. Weeks.)

“B” end; also had handholds missing on the “B” end.

Mr. LIST.—I think the complaint only mentions the automatic coupler.

Mr. WINDERS.—Yes, I had not heard about the handholds.

The COURT.—That part about the handholds will be stricken.

Q. (Mr. LIST.) Referring to the tenth cause of action, car No. 58618,—what was its condition when you first saw it and when it was leaving in the train?

A. It had a side ladder tread bent and no clearance.

Q. What was the location of that ladder? [122—87]

A. On the “B” end.

Q. Referring now to the third cause of action, what was the condition of Northern Pacific flat car No. 68327 when you first inspected it and when you saw it leave in Extra East engine 1616?

A. The undercut lever was missing on the “B” end.

Mr. WINDERS.—If the Court please, one of my witnesses,—Mr. Nixon,—has just got a telegram saying that his wife is ill and of course he desires to leave as soon as possible. May we have permission to put him on out of order?

Mr. LIST.—Certainly; we have no objection to that.

(Mr. Weeks is excused from the stand temporarily.)

Testimony of Charles L. Nixon, for Defendant.

CHARLES L. NIXON, produced as a witness on behalf of defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Where do you reside? A. Portland.

Q. You have just received a message saying that your wife has been taken to the hospital.

A. Yes, sir.

Q. In whose employ are you, Mr. Nixon? [123—88]

A. Union Pacific and O.-W. R. & N.

Q. In what capacity? A. Conductor.

Q. You were acting as trainmaster at the time of the strike, were you, Mr. Nixon? A. Yes, sir.

Q. On account of the conditions at Centralia, were you loaned to the Northern Pacific to help out at that point? A. I was sent up there to assist.

Q. How much railroad experience have you had, Mr. Nixon? A. About thirty-two years.

Q. You operated trains during that time,—handled trains and equipment?

A. Yes, all the time.

Q. What was the condition that existed at Centralia as far as inspection and repair of cars is concerned on the 2d of September?

A. There was not anyone up there but Mr. Alsip and Mr. Campbell and myself. I got there the night of the second.

(Testimony of Charles L. Nixon.)

Q. You went to work on the night of the second?

A. Yes. I worked up at the depot the night of the second particularly helping get passenger trains through there.

Q. If you did not get there until the night of the second,—these cars went out the morning of the second,—you were not there the morning of the second?

A. I think I went up there,—I think I got there at 1:25 on the second; 1:25 P. M. [124—89]

Q. These trains went out before that?

A. July. I went up there on the second day of July.

The COURT.—I thought you said September.

Q. (Mr. WINDERS continuing.) You have checked over these cars in the several causes of action that are claimed to have moved from Centralia in a defective condition.

A. Yes, I have heard the evidence.

Q. You have checked over the causes of action as to those cars? A. Yes, sir.

Q. Were you on duty at the time these trains moved, Mr. Nixon? Did you inspect these trains in which these cars were supposed to be contained?

A. I presume possibly that I did.

Mr. LIST.—I move to strike that, if your Honor please.

The COURT.—The motion will be granted.

Q. (Mr. WINDERS continuing.) Were you inspecting those cars that went out in those trains the morning of the second of September?

(Testimony of Charles L. Nixon.)

A. Yes, sir, I was there.

Q. Were there any records kept of the inspection at that time, Mr. Nixon?

A. None so far as I know. None kept by me or Mr. Alsip.

Q. You and Mr. Alsip were inspecting trains on that morning, were you not?

A. Yes, sir; and all the other mornings.

Q. Did you work together?

A. Yes, sir; we worked together.

Q. That was necessary for other reasons than inspection, [125—90] Mr. Nixon?

A. We thought so.

Q. Now, it has been testified that ordinarily these cars are inspected and slight repairs made before they are put into the train. Is that correct, Mr. Nixon, in normal times?

A. Yes, in normal times.

Q. Just tell the jury when and what time these cars leaving Centralia on this day,—all cars leaving Centralia on the second day of September, leaving in the morning,—were inspected and whether they were inspected before they were put into the train or after?

A. They were inspected after they were put into the train.

Q. Who is Mr. Alsip?

A. He is trainmaster for the Northern Pacific.

Q. How long would you work on a train? Would you work on the train inspecting and re-

(Testimony of Charles L. Nixon.)

pairing until after the road engine was attached or until the train went out?

A. We would wait until the train went out. The last thing we did was to test the air.

A. Did you find on cars moving at this time and other times these grabirons that were bent in against the cars? A. Yes, sir.

Q. Did you find cars that had a coupling lever off or loose? A. Yes, sometimes we did.

Q. What would you do in those cases?

A. In case we could not fix them, we had them set out.

Q. Could you fix a bent handhold?

A. Yes, they were very simple. We carried a short bar. [126—91]

Q. Did you fix the hand levers on these automatic brakes? A. How is that?

Q. These levers on the brakes that were pulled up,—these brake staffs? A. Couplers?

Q. Couplers.

A. We repaired a great many of them with wire. We did not have anything else to do it with.

Q. You repaired them with wire?

A. Yes, take it where there was a connection broke or a link broken, we would take a short piece of wire and repair it so that they could be operated from the outside.

Q. Do you remember seeing Mr. Weeks and Mr. Winter around the Centralia yards?

(Testimony of Charles L. Nixon.)

A. I remember seeing Mr. Winter a time or two. I don't remember seeing Mr. Weeks.

Q. Were you around these trains at the time the trains actually pulled out?

A. Usually we were there until they started to pull out.

Q. Why were you there until they started to pull out?

A. The last thing we did was to make a terminal air test. That was up to us to do before they left.

Q. If these cars, as was testified to by Mr. Winter and as will probably be testified to by the other witness, did come into that yard with a bent grabiron or a step off, or a handhold loose, would those repairs be made under the conditions existing at Centralia during the strike before they were put into the train to go out? [127—92]

A. No, we did not make any inspection of the incoming trains.

Q. You made no inspection and no repairs until the train was made up to go out?

A. That is it.

Q. We will refer here to these Centralia cases. They say that on car 64036 the sill step on the left-hand end of the side of the car near the "A" end was broken. They now have testified that it was clear off. Now, is it a serious matter or much of a task to put on a sill step?

A. It would depend of course on whether the bolts were broken. As a rule it is not, no.

(Testimony of Charles L. Nixon.)

Q. Did you put sill steps on cars that were missing at Centralia during this period?

A. Once or twice.

Q. The repair or fixing of a sill step or straightening out a brake rod,—that would be done after the cars had been switched into the train to go out?

A. We would not find them before that.

Q. You would not look for them before that?

A. No, did not have time.

Q. What is the fact as to whether or not after the road engine was attached to the train and the train had moved some distance you would hold up the train until you could go through your train and straighten out any defects that you could straighten out?

A. We always had that done before they would get out. We inspected the train before we made the air test.

Q. It is alleged that on the second day of September, 1922, [128—93] the following cars at Centralia were hauled out over the main line with the following defects: C. B. & Q. flat No. 90501, the uncoupling lever being disconnected from lock block of coupler on the "B" end; N. P. box-car No. 24620, the lock link of the coupler on the "B" end being broken; N. P. car 63839, with the hand brake chain broken; N. P. 64036, with the sill step on the left-hand end broken; and N. P. flat 61753, with the handhold on the right-hand side,—I will not ask you that question just now,—what is your testimony as to whether or not when those trains

(Testimony of Charles L. Nixon.)

actually left Centralia out on their road runs those defects existed in those cars?

A. I don't think they existed when they left. If they were defective in the first place, because sill steps and all those defects such as undercut levers and more especially the handholds would be looked after pretty close.

Q. Were there any trains that you permitted to go out from Centralia with cars containing defects as testified to here existing when they went out on the main line? A. Not to my knowledge.

Q. Did you and Alsip inspect each car in these trains?

A. He went up one side and I the other. I don't know just what time they got more help there; but I don't think they had it at that time.

Q. Now, you have heard the testimony here as to a log fouling the end handholds. Did those Northern Pacific cars have bunks on them?

A. Yes, they had long bunks. [129—94]

Q. Did those bunks extend up above the floor, and if so, how high? A. Six or eight inches.

Q. So that when the log would lie on that car the log itself would be elevated six or eight inches above the floor of the car? A. Yes, sir.

Q. Did you ever in your twenty-eight years' experience as a train man or in your experience at Centralia ever see on a log car with bunks or any logging car anywhere a log that could extend down low enough to foul the handhold, or leave less than two inches clearance on the handhold of the car?

(Testimony of Charles L. Nixon.)

A. I can't ever recall a case where it did.

Q. As a railroad man, tell this jury whether in your opinion that is a situation that is possible on a log flat with bunks on it,—a situation so that the log could have its end gotten down low enough, lying on the bunk, to be within two inches of the grabiron on the end?

A. I never saw one do that, because it is elevated eight inches from the top of the floor, and they are loaded lengthways of the car.

Cross-examination.

(By Mr. LIST.)

Q. You went over there July 1st? A. July 2d.

Q. How long did you stay over there?

A. I stayed over there until some time about the middle of [130—95] September.

Q. You were there on September 2d. On September 2d you were there working?

A. I must have been.

Q. I don't want to know what you must have been. I want to know if you were there on September 2d? A. Yes.

Q. You are sure of that? A. Yes.

Q. How many were working there at that time?

A. I don't know.

Q. There was usually somebody working inspecting cars besides yourself?

A. Mr. Alsip was there.

Q. What was he doing?

(Testimony of Charles L. Nixon.)

A. He was helping get the trains out and light repair work,—whatever was necessary.

Q. The same repair work that you did?

A. Yes.

Q. Was anybody else there?

A. Yes, we had some fellows there. I have no recollection of how many or what their names were.

Q. I don't want their names, I want to know how many more men there were on September 2d doing this work besides yourself and Alsip?

A. I cannot tell you.

Q. Would you say there were four or five or more men doing inspecting?

A. There were possibly four or five more men there, but they were not all doing inspecting, because they didn't [131—96] know anything about it. They didn't know anything about defects.

Q. What were they there for?

A. To help whatever repair work they could do.

Q. If you found a defect you would turn it over to them to make repairs?

A. They were there right along with us.

Q. How many were there actually making inspections, besides yourself and Mr. Alsip?

A. There was only one more that I can be positive of.

Q. Three of you? A. Yes.

Q. All three of you, you think, inspected every train that went out of there? Did you inspect

(Testimony of Charles L. Nixon.)

every train that went out of there on September second,—the three of you?

A. Up to the time we were on shift. We usually went to work at seven o'clock in the evening and went off at seven o'clock in the morning after the rush was over.

Q. Your shift was from seven o'clock in the evening until seven o'clock in the morning?

A. From seven o'clock in the evening until most any old time in the morning. We have stayed there as late as ten o'clock.

Q. You and Mr. Alsip and whoever else was there,—you all inspected each train that went out,—that is correct?

A. Yes, sir, at least two of us.

Q. At least two would inspect every train?

A. Yes.

Q. You kept those cars in good condition that went out? [132—97]

A. I would not say good condition.

Q. You made repairs to all penalty defects?

A. That is our intention.

Q. You testify that you did not have any car sent out with a penalty defect such as testified to by Mr. Winter,—that is correct?

A. Not to my knowledge it never did.

Q. If they did not go out in that condition, if they were defective you made repairs to them before they went out?

A. We made repairs all that we saw.

(Testimony of Charles L. Nixon.)

Q. You feel that you kept everything in good shape that went out of there at that time?

A. No.

Q. You think a lot of cars went out of there that were defective?

A. Yes, but I don't think that so many of them had the penalty defects. Those are the ones that are easily detected.

Q. You did not make any record of any trains that you inspected? A. No, sir.

Q. You did not make any record of any car?

A. No.

Q. You did not even make a short memorandum of any car that you inspected?

A. Did not even carry a pencil, I don't think.

Q. You think that the two of you kept those trains in about as good condition, so far as penalty defects are concerned, as they were kept before the strike? A. No.

Q. You think their condition was worse than before the strike? [133—98] A. Yes.

Q. There must have been a good many of those cars got away?

A. Not of the nature of penalty defects. There is a lot of defects on a car that I don't know anything about; but those particular ones are brought to my attention.

Q. So that Centralia at that time was a repair point for penalty defects?

A. I cannot say as to that.

Q. You made repairs there?

(Testimony of Charles L. Nixon.)

A. We fixed anything that was out of order that we could.

Q. Prior to that time that you came from the Union Pacific what work were you engaged in?

A. I have been conductor for the Union Pacific for thirteen years.

Q. Were you conductor on July 1, 1922?

A. Yes, sir.

Q. What kind of service? A. Freight.

Q. Between what points?

A. Centralia and Portland.

Q. The strike went into effect July 1st?

A. Yes, sir.

Q. Was there a strike on the Union Pacific at that time? A. Yes, sir.

Q. Did it affect the Union Pacific?

A. It affected them, yes.

Q. How was it that the Union Pacific could spare you and send you over to the other railroad to do this work?

A. They asked me to go up there and help supervise and help get the trains through on account of the delays they were [134—99] having,—serious delays.

Q. You went up from what point?

A. From Portland.

Q. Long before the strike went into effect they were having those serious delays?

A. No, they had delays the night of the first.

Q. If you got your orders on the first and the

(Testimony of Charles L. Nixon.)

strike went into effect on the first, you got pretty quick action? A. Yes, sir.

Q. You think that was the reason? A. Yes.

Q. Did you have any serious delays on the Union Pacific? A. I don't know. I presume so.

Q. Did you have any trouble getting men on the Union Pacific? A. I don't know.

Q. How long was it before any men were sent in there besides yourself to do additional work? ,

A. Along about Labor Day.

Q. None were sent in July or August?

A. Very few. Yes, I think the Northern Pacific had some of their men out of their departments that came in and assisted.

Q. The question has been raised here, Mr. Nixon, about some railroad men being antagonistic to the Northern Pacific. I assume of course that you know.

Mr. WINDERS.—What is that question?

Mr. LIST.—The question has been raised about some railroad men being antagonistic to the Northern Pacific.

Q. Mr. LIST.—You are not a member of the Switchmen's [135—100] Organization, are you?

A. No, sir.

Q. Are you a member of the Inspectors'?

A. No.

Q. Were you a member of the machinists or any organization that went out on strike?

Mr. WINDERS.—You bet he was not. I object to that.

(Testimony of Charles L. Nixon.)

The COURT.—Objection sustained. It is not cross-examination.

Q. (Mr. LIST.) Now, Mr. Nixon, I am going to ask you if on September 2d, 1922 you made any inspection at all of certain cars that went out in train known as Extra North, engine 1251 and 1611?

A. I don't know. I haven't any record.

Q. Are you able to tell us if Northern Pacific car 61753 was defective and whether you or Mr. Alsip discovered the defect and made any repairs?

A. I am not able.

Q. That is true of all the cars that went out on September 2d? A. I haven't any record.

Q. Have you any record of the orders under which you were sent from the Union Pacific over to Centralia? Were you sent on a written order?

A. No.

Redirect Examination.

(By Mr. WINDERS.)

Q. Have you any feeling one way or the other either for the Northern Pacific or against whoever may be responsible for this lawsuit? [136—101]

A. Not a bit in the world.

Q. You think a whole lot of the United States, just as I do, do you? A. Yes, indeed.

Q. As far as these trains that counsel has been talking about, you didn't keep any number of the engine or the train? A. No, we had no time.

Q. And there were some men that were sent down there for the purpose of doing what they could to

(Testimony of Charles L. Nixon.)

assist after the first of July. There were more men from time to time sent down to Centralia?

A. Yes, very few.

Q. But so far as the inspection of the cars were concerned and seeing that commodities moved through Centralia that was up to you and Alsip and Campbell? A. Yes.

Q. Who is Campbell?

A. Campbell, I think, is supervisor of bridges and buildings for the Northern Pacific.

Q. Supervisor of bridges and buildings?

A. Yes.

Q. For the Northern Pacific?

A. For the Northern Pacific.

Q. Counsel says that you kept all the cars moving. Were there defective cars that you could not make light repairs to that were set out at Centralia?

A. There were.

Q. When you and Alsip and Campbell went along, did you look to see that all the grabirons were on the cars? A. Yes, sir. [137—102]

Q. Did you look to see that all of the brake levers were working?

A. Yes, we found a good many of them disconnected; but, as I told you, we fixed those up with wire.

Q. Did you find brake staffs on these log flats that were bent? A. Many of them.

Q. Did you permit any of those brake staffs to go out if they would not operate? A. No, sir.

(Testimony of Charles L. Nixon.)

The COURT.—Did you understand that last question?

Mr. WINDERS.—I asked if he permitted any cars that had bent brake staffs that would not operate to go forward from Centralia.

The COURT.—Did he prevent?

Mr. WINDERS.—Did he permit them to go forward. I beg your Honor's pardon.

Q. Would it be possible for any inspector to go through that yard while the cars were being inspected, and from the inspection then made determine the condition of those cars when they left Centralia? In other words, would the condition of the cars before they were switched into the outgoing train be any indication as to their condition when they went out of town?

A. No. The more so with logs or with a commodity loaded on a flat car than others, because in a switching movement they are shifted either way with any rough handling.

Q. Have you ever seen any logs shift over so it would get within two inches of the handhold?
[138—103]

A. No.

Recross-examination.

(By Mr. LIST.)

Q. I understood you to say that you inspected the cars and if you found a defect and you notified the repair man and made repairs? A. No.

Q. You made the repairs yourself?

A. We made repairs. Later on in the latter part

(Testimony of Charles L. Nixon.)

of the trouble we had a few that they sent up there. If they were along and we found a handhold bent we would have them straighten it, and we would move on up to avoid delay.

Q. I didn't understand whether you would make those yourselves or not?

A. We made the repairs.

(Witness excused.) [139—104]

**Testimony of William E. Weeks, for Plaintiff
(Recalled.)**

WILLIAM E. WEEKS, recalled, testified as follows:

Q. (Mr. LIST resuming direct examination.) Did you inspect Northern Pacific flat car No. 68327?

A. Yes, sir.

Q. Just state what its condition was when you first inspected it and when it went out in Extra 1616.

A. That is the third cause of action?

Q. That is the third cause of action, yes.

A. No. 68327. The tower on the coupling lever missing on the "B" end.

Q. Referring to the fourth cause of action—car No. 66150,—state what its condition was when you first inspected it and when you saw it leave in train No. 930, engine 1784.

A. Vertical brake shaft. Log loaded on top of brake wheel. Inoperative.

Q. Referring to the fifth cause of action,—what was the condition of Northern Pacific car No. 61611

(Testimony of William E. Weeks.)

when you first inspected it and when you saw it leave?

A. Brake shaft bent over. Car loaded with logs. Inoperative.

Q. The sixth cause of action,—car No. 63242,—what was its condition when you first inspected it and when it left in train No. 930?

A. Vertical brake shaft bent over the car. Inoperative.

Q. Referring to the seventh cause of action,—what was the condition of Northern Pacific flat car No. 68347 when it was first inspected and when you saw it leave in train No. 930?

A. Handhold missing from the “A” end left side. [140—105]

Q. Left side facing that end,—is that what you mean?

A. That would be the left side facing the “A” end of the car.

Q. Was that a side or end handhold?

A. An end handhold.

Q. Referring to the eighth cause of action,—Northern Pacific car No. 67105,—what was its condition when you inspected it and when it left in train No. 930? A. Brake wheel missing.

Mr. WINDERS.—I have admitted that car was defective.

Q. (Mr. LIST.) Referring to the ninth cause of action,—Northern Pacific flat car No. 64764,—what was its condition when it left in train 930 and when you first inspected it?

(Testimony of William E. Weeks.)

A. Both side handholds missing on the "B" end.

Q. Referring to the eleventh cause of action, what was the condition of Northern Pacific flat car No. 67399 when you first saw it and when it left in train 930?

A. Handhold bent in the sill, right side. No clearance.

Q. Was that an end or side handhold?

A. A side handhold.

Q. Referring to the twelfth cause of action,—Northern Pacific flat car No. 65296,—what was its condition when it left and when you first inspected it? A. Brake shaft bent. Inoperative.

Q. Referring to the thirteenth cause of action,—Northern Pacific car No. 61753 on September 2d at Centralia,—what was its condition when you first saw it and what was its condition when you saw it leave? [141—106]

A. Log over handhold on "A" end and right-hand sill.

Q. What effect did that have on the use of that handhold?

A. Gave it no clearance. It could not be used.

Q. Referring to the fourteenth cause of action, what did you observe to be the condition of Northern Pacific flat car number 64036 when it left in train 969 from Centralia?

A. Sill step missing "A" end right side.

Q. Referring to the fifteenth cause of action,—C., B. & Q. flat car No. 90501,—what was its con-

(Testimony of William E. Weeks.)

dition when it left Centralia on the 2d day of September?

A. Lock link disconnected on the "B" end.

Q. Referring to the sixteenth cause of action,—Northern Pacific box-car No. 24620,—what was its condition when it left Centralia on September 2d, 1922? A. Lock link broken. Sharon.

Q. You mean a Sharon coupler?

A. Sharon coupler on the "B" end.

Q. Referring to the seventeenth cause of action,—Northern Pacific flat car No. 63839,—what was its condition when it went out in Extra North 1672?

A. Broken brake chain about one foot from the rear end. Hanging down.

Q. Referring to the eighteenth cause of action,—C. G. W. box-car No. 13330,—what was its condition when it was moved from the interchange track to the Northern Pacific in Seattle on September 7, 1922?

A. The coupler was 30 inches high on the "A" end. [142—107]

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Weeks, you have been at this work a good many years, haven't you?

A. Yes, sir, quite a few years.

Q. You would not say, would you, Mr. Weeks, that taking this whole bunch of eighteen violations, there was anything serious about them?

A. I don't get your question.

(Testimony of William E. Weeks.)

Q. I say taking this whole bunch of eighteen violations, as you saw them, there wasn't anything very serious about them, was there?

A. The seriousness would be to the men that tried to use them and they would not be there.

Q. Now, a great bunch of these cars, for instance, went out to the Northwest Lumber Company loaded with logs,—to Lake Washington,—to Narco,—you know where that is? A. Yes.

Q. The complaint about them is that when you and Winter looked at them there were some of the grabirons that had been pounded in close, and some of these uncoupling levers were not working, and the most of them, these brake shafts were bent? There wouldn't be anybody going to use those brake shafts or those uncoupling levers, until they got that whole string of log flats out here on Lake Washington?

A. That depends, if I may answer it in my way.

Q. Without going into great detail, you do consider, then, as an inspector of safety, that the character of equipment in the movement being made constituted a very, [143—108] very serious infraction.

A. Yes, I would consider them serious infractions.

Q. You felt that these log flats,—they were practically all log flats, weren't they, Weeks?

A. Yes, I think they were.

Q. Moved undoubtedly off logging railroads onto

(Testimony of William E. Weeks.)

the company tracks. Most of these log flats are loaded in some logging railroad, aren't they?

A. Yes, sir.

Q. You would think that a loaded box-car, loaded with commercial freight going over the Cascade mountains, that had something wrong with its air, something wrong with its actual ability to couple, would be a great deal more serious than a bent handhold or a missing coupling lever on a log flat?

A. No, I would class them in the same seriousness.

Q. In other words, as an arm of the government you would class anything of this character, one as serious as the other?

A. Anything that I considered in violation of the Interstate Commerce Commission, yes.

Q. Now, you went out to Auburn that morning, did you, Weeks?

A. I cannot say unless I can see my travel sheet.

Q. That book you have got there,—doesn't that show where you worked the day before?

A. Not necessarily.

Q. You might look and see, Mr. Weeks.

A. (Looking at book.) No, Mr. Winders, this shows only the last violation that was filed, which was filed June 21, approximately 90 days before that. This is not the [144—109] regular inspection book.

Q. So that that book only shows the time previous that you have made a violation report?

(Testimony of William E. Weeks.)

A. That we filed any suits for prosecution; yes, sir.

Q. Do you remember of staying all night in Auburn in the last of August or about Labor Day?

A. No, I don't think I did.

Q. You live in Seattle, do you, Mr. Weeks?

A. I live in Tacoma.

Q. You were with Winter, I suppose, when he made these various examinations? A. Yes, sir.

Q. Does your book give us any more accurate time as to the time you discovered these defects than Winter's?

A. I don't know whether it does. If you will specify what you want I will give you what I have.

Q. We will just start right out now and take this bunch of cars going to Renton and Narco. Car No. 66150? A. What count is that?

Q. The fourth count. What time did you examine that car?

A. The way the notes are made in the office, Mr. Winders, in showing the—

Q. The question now is, what time, if your record shows, did you examine that car?

A. The record shows first inspected from eight until 8:50.

Q. From 8 until 8:50?

A. May I read my notes?

Q. Does that have to do with the time?

A. It does. [145—110]

Q. Go ahead.

(Testimony of William E. Weeks.)

A. The following cars first inspected 8 to 8:50, and all eight cases handled over the main line in regular local freight train containing lumber, hay, and other revenue in this train.

Q. You have them all bunched as between 8 and 8:50?

A. That is the time we first discovered the cars to be defective.

Q. Have you got any record of any time that you examined them after 8:50 in the morning?

A. The time that they departed only.

Q. What time did they depart?

A. 9:50. That is the time the train started to move.

Q. As a matter of fact, your record shows that all of the eight cars going out towards Seattle were inspected between 8 and 8:50 except when they went out in the train? A. Yes, sir.

Q. So that, as a matter of fact, if Mr. Winter examined a car at 9:45, you were not with him when he made that examination? A. Let us see.

Q. What car numbers have you got there between 8 and 8:50?

A. Between 8 and 8:50, 68347, 63242, and 61611.

Q. Now, 61611 is the fifth cause of action?

A. Yes, sir.

Q. Concerning which he testified that he made an inspection at 9:45. If he made an inspection at 9:45, and you made your last inspection at 8:50, you were not with him [146—111] when he made that last inspection?

(Testimony of William E. Weeks.)

A. We don't necessarily trail each other in that way.

Q. Anyway, you did not look at any of these cars until the train went out of the yard?

A. I don't say that I did not look at them. I said I kept no record.

Q. I understood you to say that you did not examine them after 8:50 until you saw the train go out of the yard?

A. I cannot say that I did not. I say that I kept no record.

Q. I knew that you would say that, because I knew that it was a fact. A. That is a fact.

Q. This train went towards Seattle, didn't it?

A. 930. I would not say. It went north. It must have gone towards Seattle.

Q. It would have to have gone between Auburn and Kent to have gone north. As a matter of fact, it went over the belt line. It went around to Renton. Let us look at 67219. A. 67219.

Q. That is the first cause of action, Mr. Weeks,—and 61585. A. 67219.

Q. When did you look at that car?

A. Handhold bent against car. No clearance.

Q. When did you examine that car according to your records? A. About 9:30.

Q. About 9:30? A. Yes. [147—112]

Q. How about the next car,—61585?

A. Let us see what that says. About 9:45.

Q. You must have had to skip some to get up at 9:50 and watch this other train go out. These two

(Testimony of William E. Weeks.)

cars were on different trains. These two cars that you examined,—one at 9:30 and one at 9:45, did not go out on this train that left at 9:50.

A. No, but when they got on the lead they would be on the same track.

Q. When you left those cars at 9:45,—67219 and 61585,—was the road engine attached? That was thirty-five minutes before the train left?

A. I can't say.

Q. Now, then, let us see. There was another train left at 10:10,—car No. 68327,—third cause of action,—what time did you look at that car?

A. About nine o'clock. Nine A. M.

Q. About nine? A. Yes.

Q. You probably went from the one train over to that train,—you went from the first train which you testified you examined at 8:50,—examined that train, and got over to the other train about 9:30.

A. I can't say.

Q. Anyhow we have got nine cars here that you examined between 8 and 8:30 and 8:50? A. 8:50.

Q. Then you examined another train at 9:30 and 9:45, and you examined this car when?

A. This car here (indicating)? [148—113]

Q. Yes. A. About nine o'clock.

Q. Getting through with this first train at 8:50, examining this train at nine,—the second train,—and then got over to the third train you are testifying to, and you were through with that about 9:45, then you went up to see the train go out at 9:50 and came back to see a train go out at 10:10,

(Testimony of William E. Weeks.)

and then go over to see a train go out at 10:20. These trains all go out from different sides of the yard.

A. Our movements to see three trains depart would probably cover 100 feet.

Q. How long are these big freight drags? Give us some idea?

A. It depends on how many cars they have.

Q. How many cars do you think they have? Do you have any independent recollection? A. No.

Q. These cars when you saw them, were they being switched into the train or were they already in the train,—into these three trains?

A. 68327,—my notes says that I saw it leave.

Q. The question is when you examined that car some little time before the train did leave, was it in the train or was it in a switching movement?

A. I can't say.

Q. Can you say as to any of these cars when you saw them, whether you saw them in a train actually or in a switching movement?

A. As to any of these cars you were speaking about, I cannot; [149—114] but as to the Centralia cars, I can.

Q. Now, we will leave Auburn and go to Centralia. Did you stay over night in Centralia?

A. Yes, sir, I generally do. I think I did.

A. JUROR.—If that witness will face this way we can hear him much better.

Q. (Mr. WINDERS continuing.) All right,

(Testimony of William E. Weeks.)

What time did you examine car No. 61753? That is the first Centralia car.

A. About 7:10 in the morning.

Q. About 7:10? That is the car on which the log extended over within two inches of the grabiron, isn't it, Weeks? A. Yes, that is the one.

Q. Did you ever see that happen before?

A. Yes.

Q. Have you? A. Yes.

Q. Do you know whether this car had any bunks on or not?

A. Why, the majority of them do, Mr. Winders. Some of them do not.

Q. To what is this end handhold attached?

A. The end handhold is applied to the end sill. On the Northern Pacific flat cars, as a general thing they have a piece of sheet iron. The grab-iron is applied. It has a foot on it. It causes it to stand up. They apply that very close to the top of the car. That question has been raised by me with your department,—the mechanical department,—before now, that when—

Q. Irrespective of any dispute as to the proper way to [150—115] put on those things, it was not violating any law the way it was on there without this log was on it?

A. You can apply it any way as long as you have the required clearance.

Q. The Northern Pacific officials have been applying it this way a good many years, haven't they? A. I naturally think so, yes.

(Testimony of William E. Weeks.)

The COURT.—(Addressing the jury.) Bearing in mind the cautions that I have heretofore given you, the same as though they were repeated in open court,—bearing these cautions in mind, we will adjourn until to-morrow morning at ten o'clock.

(Recess to Wednesday, June 20, 1923, at ten A. M.)

Wednesday, June 20, 1923, 10:00 A. M.

Continuation of Proceedings. All parties present.

Q. (Mr. WINDERS resuming cross-examination.) Mr. Weeks, I thought that I had left Auburn, but I want to go back to the fourteenth cause of action. Maybe that is Centralia, I am not sure. In that case you are referring to what car? Well, I will tell you. 64036 Centralia.

A. Fourteenth Centralia on 9-2?

Q. Yes. A. 64036, yes. [151—116]

Q. You say that the sill step was completely broken off at the end of that car?

A. Yes, sir.

Q. What engine pulled the train that you claim hauled that car out of the yard?

A. Engine No. 1263.

Q. Engine 1263? A. Yes, sir.

Q. 1263? A. Yes, sir.

Q. At least that was the engine that was attached to the train in which this car was contained at the time you saw it?

A. That was the engine that was hauling the train as they pulled out of town?

(Testimony of William E. Weeks.)

Q. Where were you when this train pulled out of town?

A. I was in the south end of the yard.

Q. South end? A. Yes, sir.

Q. Is that the end away from the depot or towards the depot?

A. Towards the depot.

Q. How close to the depot?

A. I should judge that is approximately four or five city blocks; four city blocks perhaps.

Q. You said yesterday a quarter of a mile.

A. Did I say a quarter of a mile?

Q. I understood you to say that. Maybe it was Mr. Winter.

A. I think it was Mr. Winter, Mr. Winders.

Q. Four or five city blocks? [152—117]

A. Yes.

Q. Did you stand alongside of this engine as it went out?

A. No, I can't say that I did. My observation is to see that the engine that we have is the one that is pulling the train, and then to notice the defects to be sure that they leave as prescribed.

Q. If this engine 1263 did not actually pull this train down on the Willapa Harbor country where this car was going, it would be pretty good evidence that there was another engine went out on that train, wouldn't it?

A. It would be pretty good evidence, but it did not do that, under my observation.

Q. When it left about a quarter of a mile from the depot it had this engine on it?

(Testimony of William E. Weeks.)

A. It did, when it passed the depot.

Q. Were you at the depot when it passed?

A. I was not at the depot when it passed, but the train did not stop.

Q. The train did not stop? A. No, sir.

Q. You are certain? You are just as positive that your record that has the engine pulling out this train as engine 1263 is correct, as you are any part of the record that you made?

A. I am so stating under oath. I would not come here if I did not.

Q. I say you are just as certain of this as anything else you testified to?

A. Yes, sir.

Q. The despatcher's sheet would pretty well show accurately [153—118] what engine went out?

A. It should.

Q. The conductor who made up the wheel report handling those cars would know, wouldn't he?

A. He ought to know.

Q. He would be with the train and the cars all the time, wouldn't he?

A. Yes, he should be.

Q. He would be? A. He should be, I say.

Q. Now, then, let us turn to another Centralia case. You were in Centralia, were you, Weeks, on the 2d of September?

A. Yes, sir.

Q. Take the seventeenth cause of action,—car No. 63839.

(Testimony of William E. Weeks.)

A. Seventeenth cause of action,—car No. 63839, yes, sir.

Q. Before you answer that question,—Mr. Winter has read the car number in the train immediately ahead of your alleged defective car and the car immediately behind. The Government requires that you make that record?

A. Yes, sir.

Q. So, on every car that you inspect, if you live up to the instructions of the Government, you must take the car on either side of this car?

A. Every car that we report for prosecution, we must.

Q. Every car that you report for prosecution you must. It is your duty when you make any report to give the car ahead and the car behind the one that you allege to be defective?

A. Yes.

Q. That is part of your duty? [154—119]

A. Yes.

Mr. LIST.—If you will allow me to correct to this extent—

Mr. WINDERS.—I am examining the witness.

Q. (Mr. WINDERS continuing.) If you do not give that or do not have it in your book the number of these cars in front or behind, you are not complying with your duty to the Government?

A. I would not have complied with the instructions, which I have.

Q. The instructions contemplate your duty, do they not? Your duty to the Government is to follow your instructions as you get them?

(Testimony of William E. Weeks.)

A. Absolutely.

Q. Now, you tell me the car that was in front and behind this other Centralia car No. 63839.

A. On the "A" end we have Northern Pacific flat car 65642, and on the "B" end we have 62213.

Q. Your record is different from Mr. Winter's, is it not?

A. My record is?

Q. Yes.

A. I don't know. I took my record from the car.

Q. Mr. Winter had another car on one end. Were you with him when you made the memorandum of these cars?

A. I can not say we were beside each other, because we don't do that.

Q. Mr. Winter was mistaken when he said you were with him when he discovered those defects?

A. If you will let me answer and explain—

Q. I am asking you this question. You have been on the [155—120] witness-stand for the last twelve years?

A. Yes, sir.

Q. In this character of cases?

A. What is your question?

Q. (Question read.)

A. I would not want to say that Mr. Winter was mistaken.

Q. Very well. That is your answer to the question?

A. It is.

Mr. HUGHES.—If you have any explanation that you want to make, you may make it.

(Testimony of William E. Weeks.)

Mr. WINDERS.—If your Honor please, I submit that he has answered that question.

The COURT.—You may explain, if you have any explanation to make.

The WITNESS.—In going through the yards before a train is made up, looking for these things—

Mr. WINDERS.—The explanation is as to whether or not he was with Winter. I don't think he should turn himself loose and argue the case to the jury.

The COURT.—Objection overruled. Explain your answer.

The WITNESS.—When we are looking for these violations, we are going through the yards, it is not necessary for us to come along either side of the car. When the train is departing we are together to be sure that the defects to be found are leaving as at the time we found it at the time of the inspection. We try to be, one on either side. Should there be a defect on that [156—121] side of the car Mr. Winter is on, I would climb over and make an effort to see that that same defect prevailed that did prevail at the time that we first inspected the car. In other words, we want to be absolutely sure that the car has the defect leaving as we have found it.

Q. (Mr. WINDERS.) That is your answer. You are certain that on every defect, if you don't see it first, and Winter sees it and calls you over and you look at it?

A. Yes, sir.

(Testimony of William E. Weeks.)

Q. You say you want to be sure they are still there. Now, in Centralia have you any record of more than one examination?

A. I have a record showing these cars—

Q. The question was, have you any record? You can answer that “yes” or “no.” Have you any record of an inspection or examination when you say you found the defects,—have you a record of any inspection or examination between that time and the time you say that you saw the train go out?

A. I have no record of any other.

Q. You also testified that you had not any independent recollection about these cars?

A. No, sir.

Q. You examine a great many cars, don't you, Weeks?

A. Yes, sir.

Q. All you can testify to is from the record that you make?

A. Yes, sir.

Q. Now, in order to clear up something that may be in the minds of the jury, counsel yesterday asked Mr. Winter on all these alleged crooked brake staffs if there was [157—122] another brake staff on the car. Do cars have more than one brake staff?

A. There is a number of cars that have more than one brake staff.

Q. In this character of log flats?

A. Not on log flats.

Q. Has any of this class of equipment that is be-

(Testimony of William E. Weeks.)

ing complained of here,—is there more than one brake staff on it?

A. I don't know of a Northern Pacific car, Mr. Winders, that has two brake staffs on it.

Q. There never has been more than one on that class of equipment?

A. Only one.

Q. Tell this jury how many penalty defects there can be on a box-car or freight-car?

A. I don't know just what you mean.

Q. Is there not something over two hundred things that can be got out of order on a box-car that are in the confines of this Act that is being sued on?

Mr. LIST.—That is objected to. The law very specifically sets out,—and very definitely,—the penalty defects. It is not necessary to have the witness review the law to the jury. The Court can do that if necessary.

The COURT.—It is not material except as bearing on the opportunity of the witness or the time required to examine the different cars that he claims to have examined. I see no other materiality. I will overrule the objection. [158—123]

Q. (Mr. WINDERS continuing.) Just tell the jury now how many defects under the Safety Appliance Act are covered by that Act and the orders of the Commission issued pursuant thereto, if you know? A. Any defect—

Q. The number. A. I cannot tell.

Q. Do you know the number, Mr. Weeks? Is there as many as two hundred?

(Testimony of William E. Weeks.)

A. No, there is not.

Q. Is there as many as one hundred ?

A. I would not like to answer.

Q. You would not. There are a great many, however?

A. Yes. If you can let me—

Q. Mr. Weeks, please let me examine you now. If learned counsel wants you to argue the case at the close, he might have that permission.

Mr. LIST.—That is not necessary, Mr. Winders, at all. I object to it.

The COURT.—Objection sustained.

Q. (Mr. WINDERS continuing.) It is your sworn duty as an inspector of this Commission to see and find any defects existing on cars that go out of a terminal, isn't it?

A. It is; yes, sir.

Q. What time did you get into the Centralia yard on the morning of the 2d day of September?

A. I cannot say.

Q. Look at your record and tell us the first car you inspected,—the time of your first inspection in the [159—124] Centralia yard on the morning of the 2d of September?

A. The first inspection shows,—the first one was found about six A. M. There are three cars on that?

Q. Six A. M.?

A. Yes, sir.

Q. So that you went to work at least at six o'clock in the morning?

(Testimony of William E. Weeks.)

A. Yes, sir.

Q. How long did you stay in that yard that day?

A. I cannot say. I have no method of telling you that.

Q. Do you remember the conditions? Was there any difficulty in the Centralia yard at that time, Mr. Weeks?

A. Why, just what do you mean, Mr. Winders?

Q. I mean just what I said. Was the company laboring under any burden at that time in the Centralia yard? Any unusual burden?

Mr. LIST.—I object to that as indefinite and uncertain.

Q. (Mr. WINDERS.) Was there a strike on in the Centralia yard?

The COURT.—Objection overruled.

Q. Was there a strike on?

A. Yes, sir.

Mr. LIST.—Exception, if your Honor please.

The COURT.—Exception allowed.

A. I have been told there was a strike on.

Q. Isn't it a fact that your attention was called to the fact that in the Centralia yard, the Auburn yard, and other yards of the Northern Pacific after a train was made up and defects were repaired, either the strikers [160—125] or sympathizers with the strikers would come along, cut the air hose, and knock off grabirons—

Mr. LIST.—I object to that, as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

Mr. LIST.—Exception.

The COURT.—Exception allowed. The strike would have something to do with the nearest available repair point. It might be considered by the jury as to whether the cars might not have been put out of order after the inspection before the train left the station.

Mr. HUGHES.—May I make this statement at this time: I don't want to be put to the trouble of making these objections all through on these same questions. I take it that counsel will ask the same questions, and your Honor will make the same ruling. So if your Honor will consider that a similar objection is made to each and every question along this line. It is the Government's contention that it is immaterial and irrelevant to the issues. We contend that the duty imposed upon the railroad companies is absolute, and we therefore object to any testimony in which they seek to excuse themselves by reason of the strike, because the statute, I think, is clear. There is no exception or excuse.

The COURT.—What is your position, if the Court holds they have got to operate the road, and the repair men and the inspectors are on strike, and [161—126] they are put in position where they can't operate because there are no men to inspect and repair the cars? What is their duty?

Mr. LIST.—They have not taken the position that there were no men to make these repairs. In fact, the evidence so far shows there were men at Centralia to make repairs. In fact, one witness

(Testimony of William E. Weeks.)

has gone as far as to state that so far as he knew there were no cars went out with penalty defects. If they were able to meet the situation as officials, it don't make any difference whether the employees were out on strike or not. They have already put a witness on the stand. That is their position here, that the car was not defective. That is the only position they have taken.

(Argument.)

The COURT.—Objection overruled.

Mr. HUGHES.—Does your Honor hold that they may into the strike situation?

The COURT.—Yes, but not going to elaborate on it. I will allow this question to be answered.

Mr. LIST.—It may be understood, your Honor, that instead of objecting to every question asked, we reserve the right to move to strike.

The COURT.—So far as that one question is concerned, it will be so understood.

Q. (Mr. WINDERS continuing.) You have testified that you had learned that there was a strike down at Centralia. I will ask you if your attention was not called, both [162—127] at Centralia and Auburn,—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane,—that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle cocks, and otherwise attempted to render the equipment defective?

A. I never saw it. I have been told that.

(Testimony of William E. Weeks.)

Mr. LIST.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection overruled.

The WITNESS.—I have been told that.

Q. (Mr. WINDERS continuing.) So you do know, do you not, that there was considerable trouble around Centralia and Auburn?

A. I know only what I was told.

Q. Who was inspecting cars in the Centralia yard when you went on duty at six o'clock A. M. the second day of September, 1922?

A. I do not know.

Q. Are you acquainted with Mr. Alsip, train-master? A. No, sir.

Q. You don't know him? A. No, sir.

Mr. WINDERS.—Stand up, Mr. Alsip.

(Mr. Alsip stands up.)

Q. Do you remember seeing Mr. Alsip down there that morning?

A. I don't know whether I did or not. I have seen the man some place, yes.

Q. What time did the inspection crew of a train sending a [163—128] train out,—what is the last thing they have to do to the train?

A. The last thing they generally do is to inspect the air,—test the air of the air brakes.

Q. When is the air tested with reference to the attaching of the road engine to pull the train out of the yard?

A. After the road engine is attached.

Q. When the inspection crew has tested the air

(Testimony of William E. Weeks.)

and the train is ready to go, they give the information upon which the train starts, do they not?

A. Why, they take down the blue flag, as a general thing.

Q. When they have coupled their air and made their inspection, and the rest of the train crew is advised, the train in the ordinary course immediately departs, does it not?

A. That is, if the engineer has the orders and the signals given by his conductor.

Q. Will the conductor give him his signals until they get a clearance from these inspectors who have inspected the train and coupled up the air and tested the air?

A. Cases have been known on your road where it has been done.

Q. Has there? A. Yes, sir.

Q. We have a pretty bad road?

A. No, I would not say that you have a bad road.

Q. The Northern Pacific has one man who does nothing else, does he not,—one of our oldest men in the service,—but go around and see that everybody is keeping up to notch,—isn't that Mr. Norton's business? A. Yes, sir.

Q. In the ordinary operation, is it not a fact that when the [164—129] men inspect the train and see that the air is hooked up and the air is tested,—when they give the conductor that information the train starts?

(Testimony of William E. Weeks.)

A. Those are the instructions that are issued, yes.

Q. At least you will agree with me that that is the instructions? A. Yes.

Q. Then, that being true, you would not let a train,—if you were in the Centralia yards,—go out of there, if you felt there was anything wrong with the air; would you?

A. I have no authority to hold your trains.

Q. You have not? A. No, sir.

Q. It is a pretty serious matter to send a train out if there is anything the matter with the air, is it not? A. Yes.

Q. They don't use hand brakes on these trains, do they, when the trains are being operated?

A. Not to my judgment.

Q. No, and it would be a pretty serious offense to send a train out with anything wrong with the air, wouldn't it, in the view of the Government?

A. Well, there could be several things wrong with the air and not violate the law.

Q. Will you please answer my question. I say, in the view of the law that you represent it would be a pretty serious offense to send a train out if the air was inoperative.

A. Oh, if it was inoperative, yes.

Q. And to determine whether it is operative, it is necessary, [165—130] and at least the rule,—that an absolute test be made just as the engine departs? A. Yes, it is.

Q. Neither the engineer nor the trainmen do

(Testimony of William E. Weeks.)

that, do they? A. No, sir.

Q. It is contrary to the rules of their organization, is it not? That has got to be done by car inspectors, hasn't it? A. At terminals.

Q. At terminals? A. Yes, sir.

Q. So that to move any car through the Centralia terminal it was necessary to have men there who understood those things, as well as the other matters incident to the inspection of the cars?

Mr. HUGHES.—I object to this line of cross-examination.

Mr. WINDERS.—I will withdraw the question.

The WITNESS.—Repeat that question.

Q. (Mr. WINDERS continuing.) So the fact remains that there were inspectors of the railroad along these two or three trains that you are talking about when you say you were in Centralia there at the time these trains departed?

A. I would not say to that, Mr. Winders. I cannot answer it.

Q. Can you answer this? Did you see any trains depart from Centralia on the 2d day of September in which the inspectors were not around that train and on and in the vicinity of that train at the time the train departed? [166—131]

A. Why, I have no notes about that. And I would be testifying from memory. I cannot answer your question.

Q. Ordinarily you go into a yard and you make your inspection of the cars before they are switched into the outgoing train?

(Testimony of William E. Weeks.)

A. No, not necessarily.

Q. Well, you said you did at Auburn. Now, did you at Centralia?

A. My notes show that we saw these cars switched at Centralia.

Q. All right, you saw them switched at Centralia. All right, sir. Had you examined them while they were being switched, or before they were being switched?

A. I can only testify from my notes.

Q. Do your notes show that you examined them while they were being switched?

A. May I read?

Q. You can tell me.

A. Saw them switching and put in train.

Q. When did you first examine a car?

A. These cars were first inspected about six A. M.

Q. I am asking you if you examined them before they were switched,—the first time,—or after they were switched?

A. I cannot answer you that.

Q. You can't say that you examined them after the first examination, either, can you, excepting to stand and see the train go by when it started out?

A. I can say that I inspected them as they went by.

Q. I say you are not telling this jury that you inspected those cars after the first time you inspected them, when [167—132] you say you don't know whether it was when they were being switched or not, except when you stood and saw them go by?

(Testimony of William E. Weeks.)

A. I did not examine them that I know of. I have no notes of that.

Q. You were on the same side of the train as Winter, I assume? A. I cannot say to that.

Q. Well, were all of these defects on the same side of the train? A. I cannot say as to that.

Q. If you and Winter were on the same side and there were some defects on the other side, you could not see them as the train went by?

A. If that was so, we could not see them. We don't generally work that way.

Q. If he says you were on the same side of the train, he is mistaken?

A. I don't say whether we were on the same side or not; but I do say we saw those cars leave.

Q. Now, let us go down to the measurements of the height of this draw bar down at the yard?

A. What car is that?

Q. C. G. W. box-car No. 13330. Did you have your rule with you that morning, Mr. Weeks?

A. Very seldom without one, Mr. Winders.

Q. I asked if you had it with you that morning?

A. Yes, sir.

Q. Tell us where you found that car?

A. That is No. 13330? [168—133]

Q. That is C. G. W. box-car 13330. What time did you see that car?

A. About eight A. M., Mr. Winders.

Q. Where was the car when you saw it?

A. On the G. N. interchange.

Q. Where is that?

(Testimony of William E. Weeks.)

A. Near the Hanford Street yard. Track No. 4.

Q. Where is that?

A. That is down west of your mill yard. West of there, between that and that waterfront.

Q. Whatcom Avenue?

A. I don't know what avenue.

Q. As a matter of fact, the interchange tracks are in Whatcom Avenue,—that is they are not in the paved part? A. I cannot say as to that.

Q. I guess the jury must all of them know. We call it Railroad Avenue until we get down to, I think, Atlantic Street. Then it is called Whatcom, and then I guess it is called East Marginal Way. Anyway it is on that street?

A. It is on that waterfront street.

Q. Down there near the Hanford Street dock of the Port? A. Yes.

Q. As you go down along the waterfront there, the jury may remember that in the yards of the Northern Pacific we have a great many tracks in there? A. Yes, they are over east of that.

Q. These transfer tracks are between the city's elevated line,—which is not elevated at that point,—

A. Yes.

Q. —and the paved part of Whatcom Avenue.
[169—134]

A. And the Milwaukee transfer tracks.

Q. And the city has their street car tracks in the streets. Then, of course, these tracks are in the street?

(Testimony of William E. Weeks.)

A. Yes, if the street car tracks are in the street, I have an idea they are in the street too.

Q. There is a great deal of traffic on that street?

A. Automobile traffic.

Q. A great deal of traffic and a great many industries down around there? A. Yes.

Q. What is that track used for?

A. Why, it is used as an interchange between the different systems where cars are delivered from one road to another.

Q. In other words, you know that this car came from the Great Northern? A. Yes, sir.

Q. The Great Northern brought that in with some more cars and set them on this interchange?

A. Yes.

Q. They were to go to some point on the Northern Pacific? A. Yes, sir.

Q. They were setting on that track at eight o'clock? A. Yes.

Q. How long did you stay there?

A. Well, we saw that car hauled over at 8:30.

Q. Where did you see it hauled? Into the yard?

A. Into the N. P. yard.

Q. The N. P. yard is about how far from where this car was standing? [170—135]

A. You mean to get into the yard?

Q. Yes.

A. Well, they would have to haul it,—oh, I should judge in the neighborhood of half a mile, and then back it down into the track. They would have to haul it off the transfer track onto the lead.

(Testimony of William E. Weeks.)

Q. You found a car on either side of this one?

A. Yes, sir; two cars.

Q. Was there any other way that the Northern Pacific could get this car into its yard than the way they did? A. No, I don't think so.

Q. They did not haul it any farther than they had to haul it to get it into their yard, did they, weeks?

A. No, I would not think so.

Q. Did you have information that there was a strike on that affected Seattle also at that time, Mr. Weeks?

A. Yes, sir, from just reading the newspapers. We had no official information.

Q. Your visit to these yards, of course, rather impressed that on your mind? A. Yes, sir.

Q. Is it your opinion, Mr. Weeks, knowing the conditions which you did know at that time, that it would have been reasonably safe for any man,—official or new employee of the Northern Pacific,—to go out on that transfer between the street car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this draw bar?

Mr. LIST.—That is objected to. It is a matter for this Court to say whether the strike sets [171—136] aside the plain provision of the law.

The COURT.—I will hear from Mr. Winders on that.

(Argument.)

The COURT.—Objection overruled.

Mr. LIST.—Exception.

(Testimony of William E. Weeks.)

A. It would have been as safe there as any other place on the road, in my opinion.

Redirect Examination.

(By Mr. LIST.)

Q. Have you made inspections on the interchange track?

A. Yes, I have made different inspections along there.

Q. Have you made a number of inspections there prior to the time the strike went into effect?

A. I have no records to show that I made any other inspections only this one.

Q. I mean had you ever made any inspections at this interchange track prior to the strike?

A. Oh, yes.

Q. Prior to that time what character of repairs were made there,—prior to the time of the strike?

A. That is something I cannot say, as to repairs they made there.

Q. I don't mean in detail, but just in a general way. Were they light or heavy, or were there any made there before the strike?

A. In answer to that question I would say that the inspections that are made at interchange points are made for the purpose of determining whether the cars are defective. [172—137]

Mr. WINDERS.—I object to that question and move to strike that answer on the ground that it is not responsive.

The COURT.—Objection overruled. Don't try to interpret the law.

(Testimony of William E. Weeks.)

Mr. LIST.—I understand, your Honor. I will try not to.

The WITNESS.—The idea of making inspections at interchanges is merely to see that defective equipment is not interchanged between the two roads.

Q. (Mr. LIST.) You say the track on which this car was placed was open at only one end or open at both ends? A. They are open at both ends.

Q. The engine number involved in the fourteenth cause of action, you testified was engine 1263?

A. 1263.

Q. I believe you also testified that the train in which the car was hauled was train No. 969?

A. Yes, sir.

Q. Where did you obtain that information?

Mr. WINDERS.—I object to that, if your Honor please.

Mr. LIST.—You asked him where he obtained the engine number.

Mr. WINDERS.—I will withdraw the objection.

A. From some member of the train crew we ascertained that.

Q. (Mr. LIST.) Now, Mr. Weeks, regarding the flat car that we were talking about yesterday on which you testified the log fouled the end handhold,—I want to ask you to state to the Court and jury just how that is constructed,— [173—138] that is, with respect to the location of the end sill and the floor of the car. Does the end sill come up to or is it below the top of the deck of the car?

A. In Northern Pacific flat cars, as I remember,

(Testimony of William E. Weeks.)

the end sill is about 6 X 11, or perhaps 12,—11, I think it is,—and the side sills are about fourteen inches deep. The lower end of the side sills are notched approximately three inches, and this end sill is set down in that and extends above the top of the side sill and the center sills also approximately two inches, or an inch and three-quarters. The decking is then laid behind the end sill over the top of this flat car.

Mr. WINDERS.—You are talking about this car in question?

The WITNESS.—I am talking about the construction of the Northern Pacific flat cars, Mr. Winders.

Mr. WINDERS.—They are all the same?

The WITNESS.—Yes. That makes the top of the car uniform. In other words, the top of the car with the decking on it is the same height as the end sill. The end grabiron is applied near the top of the end sill. Some cases they are not more than a half inch below the end sill. Sometimes they are up flush. Very seldom are they below an inch or an inch and a half on those flat cars. Inside the end of the grabiron is bolted about 24 inches from this end sill, the outside coming out within a few inches of the end sill. The inside arm, or the one towards the [174—139] center of the car, in the majority of cases, is fastened—

Mr. WINDERS.—I don't care to hear about a lot of other cars. I am talking about this flat car.

The COURT.—Objection sustained.

(Testimony of William E. Weeks.)

Mr. LIST.—On the cross-examination yesterday of both Mr. Winter and Mr. Weeks there was an attempt made to show that it was impossible to have a defect of this kind on any kind of flat cars. We certainly have a right to go into the general aspect of the situation, regardless of what was on this car. They had Mr. Nixon testify that it was impossible for a defect of this kind to occur. Mr. Nixon's testimony was not confined to this particular car.

The COURT.—I will have to sustain the objection. If he wants to explain how the handhold could be fouled by the log on the car in question, he may do so.

Mr. LIST.—I am going into that, your Honor, in just a minute.

Q. Mr. Weeks, will you step down and explain to the jury, if you can, with these books and this table just how the logs fouled the handholds on this car in question?

A. The grabiron is applied within one inch, we will say, or close to the top of the flat car. It stands out here (indicating) approximately two or two and one-half inches. The car was loaded with logs. Some were crooked. Some were larger at one end than at the other. They would be up on this bump, wherever it was, and this [175—140] end could stick down and foul this grabiron, as was done in this case. I have a cut that will show it.

Mr. WINDERS.—The cut has no log bunk on it. I will object to anything unless he puts a bunk on there and elevates this log.

(Testimony of William E. Weeks.)

The COURT.—I sustain the objection. I don't see how your drawing is going to help the jury. It is too speculative.

Mr. LIST.—The question was raised yesterday that it was impossible for logs to foul the handholds as is alleged in this particular case.

Q. (Mr. LIST.) I am going to ask you to state whether or not you have ever discovered other Northern Pacific cars with similar defects?

Mr. WINDERS.—The witness has already stated that he did.

A. I have.

Q. (Mr. LIST.) Prior to this time?

A. Since we have been out here.

Q. You started yesterday, when you were interrupted, to tell Mr. Winders about having taken that up with officials of the Northern Pacific with a view to having it corrected. Just tell what officials, if any, you had it up with?

Mr. WINDERS.—Objected to.

The COURT.—I sustain the objection.

Mr. LIST.—Exception.

The COURT.—It is not a matter of notice to the Company. If they used defective cars they are liable whether they had notice or not.

Mr. LIST.—They introduced testimony over my objection [176—141] that it was impossible for any car of this kind to become defective. I am going to prove by this witness that prior to this time he discovered similar cars similarly loaded.

Mr. WINDERS.—I will withdraw my objection,

(Testimony of William E. Weeks.)

if this man wants to swear under oath that he took it up with any official of the Northern Pacific in Seattle. We will do a little impeaching.

Q. (Mr. LIST.) Will you just state if you called this to the attention of any officials—

Mr. WINDERS.—In Seattle.

Q. (Mr. LIST.) Defects similar to the one that you testified to of logs fouling the handholds?

A. That question has been raised time and time again.

Q. You have raised it with some of the Northern Pacific officials? A. Yes.

Mr. WINDERS.—I am going to object unless he states that he took it up with somebody that I can get here.

Mr. LIST.—You have them here in the courtroom.

Q. (Mr. LIST.) Did you have any of these officials with you at any time and show them these cars that were defective?

A. When I made an inspection I always took—

Mr. WINDERS.—We are talking about logs fouling these handholds. I ask for an answer.

The COURT.—Objection sustained.

Q. (Mr. LIST.) I will ask you to state whether or not you have ever called defects of this kind to the attention of Mr. Mulvey, car foreman, or to Mr. Norton, an inspector [177—142] of equipment, of the Northern Pacific?

Mr. WINDERS.—I object to that question as to Mr. Mulvey. He is only a car foreman in the

(Testimony of William E. Weeks.)

Tacoma yard. He knows who the officials are. I object and move to strike his testimony, if it is confined to those people.

The COURT.—What is the purpose of this?

Mr. LIST.—They introduced testimony yesterday for the purpose of leading this jury to believe that a defect of that kind could not occur. I am going to show that it has occurred in the past, that he has taken it up with the car foreman, and with the inspector of equipment of this Northern Pacific Railway, with a view to having the situation rectified, and that they knew that these cars became defective in that respect.

Mr. WINDERS.—I have no objection to his testifying that he told Mr. Norton. I have Mr. Norton here; he is an official of the company.

A. I have taken those things up with the car foreman.

Q. (Mr. LIST.) Mr. Mulvey?

A. That I have made my inspections with time and again,—Mr. Mulvey and Mr. Norton.

Q. Are they here?

Mr. WINDERS.—Yes, they are here now.

A. Yes.

Q. (Mr. LIST.) Have you had that up more than once?

A. Whenever the occasion occurred and I saw them.

Q. That was prior to the time involved in this case? A. Yes. [178—143]

Q. Now, Mr. Weeks, just state to the Court and

(Testimony of William E. Weeks.)

jury what Mr. Mulvey and Mr. Norton said to you when you took that up with them?

Mr. WINDERS.—I don't think that is material.

The COURT.—Objection overruled.

A. I have never raised a defective question with either of the gentlemen that they have not remedied it if they could.

Recross-examination.

(By Mr. WINDERS.)

Q. You are acquainted with Judge Reid, are you?

A. Yes, sir.

Q. He is, as you know, the superior officer for all the Northern Pacific on the west end of the Northern Pacific system? . A. Yes, sir.

Q. You are acquainted with Mr. Blanchard?

A. Yes, sir.

Q. You know he is general manager and the superior man in charge of operation?

A. Yes, sir.

Q. Do I understand that this talk that you claim to have had with Mr. Mulvey and Mr. Norton was a general complaint about our equipment and the place that we put on our grabirons?

A. Not a general complaint, but a recommendation.

Q. As to the way in which we put on our handholds on the log flats, to what official of the Northern Pacific did you make a general complaint as to the manner in which these handholes were attached? [179—144]

(Testimony of William E. Weeks.)

A. I can't say that I made it as a general complaint. I made it as a general suggestion.

Q. Who did you make that to?

A. I have talked that matter over. I don't know whether it was ever raised with Mr. Crosby or not. I have talked it over with those other gentlemen that I spoke of. I have not called on Mr. Reid or Mr. Blanchard in several years.

Q. Is it physically possible,—now, answer me this question,—with the log bunk,—assuming of course, you have got to put these handholes on the end in with bolts, don't you? A. Yes, sir.

Q. So you have got to get your bolt hole down low enough to hold? A. Yes, sir.

Q. You say that with log bunks that elevate the logs at least a minimum of six inches above the car that you have seen those logs down there so they come within two inches of the top of the handholds,—I say you have so testified?

A. Yes, I have testified that the handholds were blocked.

Q. How many times have you ever seen that?

A. I can't tell you.

Q. Give the jury some idea?

A. I have seen it many times.

Q. Have you seen it a hundred times?

A. I would not say how many. I have said many.

Q. How would it get down there?

A. How would it get down there? [180—145]

Q. Yes.

(Testimony of William E. Weeks.)

A. By the log being crooked, or by one end being larger than the other,—by that large end standing out there.

Q. If there was a big end, it don't make any difference whether it was big or whether it was little, it would be laying on top of this log bunk? My pencil there leaves as much clearance (illustrating with pencil).

A. You have that log bunk away up there at the end.

Q. The log is still held up by the bunk, is it not? A. Not the uneven portion of the log.

Q. You say you have seen that condition a hundred times?

A. I don't say a hundred times.

Q. You have seen it fifty times?

A. I said many times.

Q. Have you seen it fifty times?

A. I cannot say.

Q. You say that you showed that to Norton and Mulvey, did you, and they remedied it?

A. I said their attention was called to those defects.

Q. Did you ever call to the attention of or show Mr. Mulvey or Mr. Norton a single car of logs on the Northern Pacific log flats, or a log flat being hauled by the Northern Pacific, where the log was down within two inches of this grabiron?

A. I have called their attention—

Q. I ask you if you have showed them one—if you were with them?

(Testimony of William E. Weeks.)

Mr. HUGHES.—I submit, your Honor, the witness should be allowed to explain.

The COURT.—Answer the question first, and then [181—146] explain afterwards.

A. I have called their attention.

Q. (Mr. WINDERS.) I will withdraw that question then. Did you ever go up or did you ever send them to a car where they could put their eyes on it, in which the log was down within two inches of the grabiron?

A. Yes, I have testified to that.

Q. Where? A. In my general inspections.

Q. At what points? At Tacoma and Auburn?

A. Naturally, if with Mr. Mulvey, it would be in Tacoma.

Q. So that Mr. Mulvey has, with his own eyes, under your sworn testimony here, seen log flats where the logs came down within two inches of this grabiron? A. Yes, sir.

Q. You are just as positive of that as anything else you have testified to?

A. Yes, sir; Mr. Winders, absolutely.

Q. Absolutely? A. Yes, sir.

Q. Have you ever in your twelve years' experience, in testifying for the Government in these cases been other than positive in every proposition that you presented? A. Have I been what?

Q. Have you ever when you have reported a defect in your twelve years of testifying and inspecting for the Government,—has there ever been a case in which you were not absolutely positive?

(Testimony of William E. Weeks.)

A. I have never filed a case except on the truth as I saw it. I have testified to the truth as I saw it. [182—147]

Q. You have testified that you did see this car, and you testified that you saw this engine that you testified to awhile ago pull this train out of the yard?

A. Yes sir.

Q. Where did Norton see one of these cars?

A. I don't know where he saw them.

Q. You say that you did call his attention to them where he could go and see them?

A. Mr. Norton and I talked those things over.

Q. Where did he see a log flat where the log was down so low that there was not a clearance of two inches?

A. Wherever we have inspected cars. In inspecting cars for years with men, I cannot call to mind any specific point.

Q. You were probably with him, were you, when he went down and saw this log too close to this grabiron?

A. Yes, if I called his attention to it, I was.

Q. You were right with him?

A. Yes, sir.

Q. It is your testimony then that Mr. Norton has seen this condition?

A. Yes, sir.

The COURT.—I want to ask you one question about the height of the draw bar. You have testified about it being thirty inches, have you?

(Testimony of William E. Weeks.)

The WITNESS.—No, sir; I don't think he asked me the height.

The COURT.—What I want to ask you is this: If the draw bar is too near the top of the rails, what has to be done to remedy it? [183—148]

The WITNESS.—They can raise the draw bar just propping it up and straightening the iron and shim it on top of that, which generally brings it within the provision.

The COURT.—Generally speaking, what would have to be done?

The WITNESS.—That would be the quickest method. Sometimes there is a great deal of play on the tops of the draw bar. Then, in that instance, they will raise the draw bar and shim on top of that.

The COURT.—Those are all cases where the draw bar in the construction of the cars is the right height?

The WITNESS.—It is a defect that has caused it.

The COURT.—A defect after the construction of the car.

The WITNESS.—Yes, after the construction of the car.

The COURT.—How are you able to see if there is just the same play that the draw bar is too low?

The WITNESS.—By measuring it from the level of the tops of the rails to the center of the core line of the coupler. We don't take it either at the face of the draw bar for the measurement, but we extend back and above the jaw in order to be ab-

(Testimony of William E. Weeks.)

solutely fair. In other words, if you come out to the flat point of the coupler and take the measurements it will either be lower or higher; but if you go back midway of that you will strike a dividing line. [184—149]

The COURT.—Your idea is that if it is too high or too low it doesn't couple satisfactorily?

The WITNESS.—It might be coupled, but on an uneven car, if it struck one with a maximum of 34 inches, if they were up in that position it would slip by.

Q. (Mr. LIST.) You did not have to guess at the center of the coupler?

A. No, sir.

(Witness excused.)

**Testimony of George B. Winter, for Plaintiff
(Recalled).**

GEORGE B. WINTER, recalled, testified as follows:

Direct Examination.

(By Mr. LIST.)

Q. Mr. Winter, do you know Mr. Mulvey, car foreman, and Mr. Norton, inspector of equipment,—both of the Northern Pacific?

A. Very well.

Q. How long have you known them?

A. Twelve or fifteen years.

Q. State whether or not you have ever taken up with either one of those gentlemen, or both of them, the question of flat cars being so constructed that

(Testimony of George B. Winter.)

the lading or the logs will foul with the handholds on the ends of the cars. If so, how often have you done this?

A. It has been done very frequently in making inspections, and finding cars with the grabirons blocked with logs, and other lading. [185-150]

Q. Have you called the attention of these gentlemen to that condition?

A. Yes, sir; I have reported cars defective in their presence, and they have taken the numbers of the cars the same as I did.

Q. What did you do with your reports?

Mr. WINDERS.—I object to that as immaterial.

Mr. LIST.—Now, if your Honor please, they raised the question a while ago that we never notified the high officials of the Northern Pacific. Now, I am going to show that he sent reports to the Interstate Commerce Commission, and copies of these reports are sent to the Northern Pacific Railway.

Mr. WINDERS.—If Mr. Winters wants to testify that he talked to Mr. Reid or Mr. Blanchard—I don't care what he did with the Interstate Commerce Commission.

The COURT.—Objection sustained.

Mr. LIST.—Exception. I offer to prove by this witness that he has made reports of cars found defective with logs fouling the handholds on the end of these flat-cars; that these reports have been sent to the Interstate Commerce Commission, and copies

(Testimony of George B. Winter.)

of them have been sent to the officials of the Northern Pacific prior to the time involved in this case.

The COURT.—You would not expect to show by this witness that the copies were sent to the Northern Pacific. [186—151]

Mr. LIST.—Of course, I would not show that by him.

Mr. WINDERS.—I object to the offer of counsel, because it is not proper.

Q. (Mr. LIST, continuing.) How many times have you had that up with them, Mr. Winter?

A. Quite a number of times in the last few years.

Q. Your attention was called to the fact,—or at least it was suggested that all of these flat-cars had bunks and that those bunks are eight inches in height? A. Yes, sir.

Q. I will ask you whether or not that is correct?

Mr. WINDERS.—I object. That is not Mr. Winter's testimony. Mr. Weeks testified,—that is the only testimony so far,—that these bunks were six or eight inches in height.

The COURT.—A question that involves a reference to former testimony necessarily implies that testimony was given such as was cited. That always leads to a dispute as to whether it was or not, because the other side, if they don't remember just as you do, will think you misquoted it. I sustained the objection.

Q. (Mr. LIST continuing.) I will ask you whether or not you know that all the bunks on these cars are six inches or more in height, or whether

(Testimony of George B. Winter.)

you know them to be less than six inches or as low as four inches.

A. They are as low as four inches. Many of them four and four and one-eighth. They are not all equipped with log bunks.

Q. Have you had occasion recently to find some as low as [187—162] four inches?

A. I have seen some this morning.

Q. Will you give us the number of those cars and tell us where you saw them?

Mr. WINDERS.—I object to that.

The COURT.—Objection sustained.

Q. (Mr. LIST.) Was anyone representing the Northern Pacific with you when you saw these cars?

Mr. WINDERS.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. LIST.—Exception.

Q. (Mr. LIST.) Mr. Winter, I will ask you to state whether or not you had occasion recently to find a car loaded with logs so that if the log shifts it would foul the hand brakes similar to the one that you testified about.

Mr. WINDERS.—I object to that.

The COURT.—I sustain the objection.

Mr. LIST.—I offer to prove—does the Court want the jury out when I make the offer?

Mr. WINDERS.—No, go ahead. I won't object to the jury being present.

Mr. LIST.—I offer to prove by this witness that in Auburn this morning in company with Mr. Pitts,

(Testimony of George B. Winter.)

and Mr. Hazen, the car inspector for the Northern Pacific, they found a car—

Mr. WINDERS.—I object.

The COURT.—I sustain the objection.

Mr. LIST.—Do I understand that there is an objection to my making the offer of proof? [188—153]

The COURT.—When your offer shows that it relates to these recent transactions, I sustain the objection. If you care to complete your offer after the jury goes out at twelve o'clock, you may do so.

Cross-examination.

(By Mr. WINDERS.)

Q. You have talked to Mr. Mulvey and Mr. Norton a great many times about logs extending over the grabiron on the end of the car, have you?

A. Yes, sir.

Q. You have pointed out a great many of them to them? A. Yes, sir.

Q. And you were skirmishing around this morning, were you, out at Auburn?

A. I have been at Auburn this morning and made an inspection, yes, sir.

Q. Of cars in the yard? A. Yes, sir.

Q. Were you and Mr. Weeks together when you made these talks to Mr. Norton and Mr. Mulvey?

A. Not necessarily.

Q. I am asking you if you were?

A. I don't remember.

(Witness excused.) [189—154]

Testimony of M. V. Pitts, for Plaintiff.

M. V. PITTS, produced as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. LIST.)

Q. What is your full name?

A. M. V. Pitts.

Q. How are you employed at present?

A. As an inspector of safety appliances, Interstate Commerce Commission.

Q. How long have you held that position?

A. I received my appointment the 13th of December, 1922.

Q. Prior to that time were you in the railroad service? A. Yes, sir.

Q. In what capacity?

A. Employed as a switchman on the O.-W. R. & N.

Q. At what point? A. Spokane.

Q. How long were you in that position?

A. From the 7th day of March, 1912, I think.

Q. And prior to that time what was your experience?

A. I was employed as a conductor on the Great Northern.

Q. Were you with Mr. Winter this morning at Auburn? A. Yes, sir.

Q. In the yards of the Northern Pacific?

A. Yes, sir.

(Testimony of M. V. Pitts.)

Mr. LIST.—I desire the record to show that I want to make the same offer of proof through Mr. Pitts that I will make through Mr. Winter.

The COURT.—Any objection? [190—155]

Mr. WINDERS.—I will object to all that offer except if he is prepared to testify that he saw logs extending down over the end of the car to within two inches of the grabiron. I will withdraw my objection to the offer to prove that as to this witness.

Q. (Mr. LIST.) Did you have anyone there at that time at Auburn representing the Northern Pacific railroad? A. Yes, sir.

Q. What was his name? A. J. S. Hazen.

Q. Do you know what his position was with the Northern Pacific?

A. He is chief inspector at that point.

Q. Did you in company with Mr. Hazen see any cars there that had bunks on? A. Yes, sir.

Q. What was the height of those bunks?

Mr. WINDERS.—I object to that question. Counsel understands what I have no objection to. I am objecting to what he saw out there this morning in the way of bunks.

Mr. LIST.—I understood he withdrew the objection.

Mr. WINDERS.—I said I withdrew the objection if he wanted to swear that he saw logs extending down over the end of the car within two inches of the grabiron.

Mr. LIST.—I will make that offer.

(Testimony of M. V. Pitts.)

The COURT.—Make your offer at twelve o'clock. Is that your case?

Mr. LIST.—Yes, your Honor.

(Witness excused.) [191—156]

(Opening statement on behalf of defendant by Mr. Winders.)

The COURT.—Court will be at recess until 1:30. You, Gentlemen of the jury, are excused until half past one o'clock. I will remain, and counsel, and the stenographer, until plaintiff's counsel completes his offer.

(Jury retires.)

Mr. LIST.—Now, if the Court please, I offer to prove by Mr. Winter, a Government witness, that this morning in company with Mr. Pitts, another inspector of the Interstate Commerce Commission, and Mr. Hazen, chief car inspector of the Northern Pacific at Auburn, they made an inspection of a number of flat cars similar to the ones involved in this case as to which it was testified that the logs on the cars fouled the handhold so that there was no clearance, and that it could not be used; that they found a number of cars where the bunks on the cars were only four inches in height. I offer that because it was suggested yesterday that none of these cars had bunks less than either six or eight inches in height. There was some misunderstanding as to what was testified to.

Mr. WINDERS.—I object to that offer as incompetent, irrelevant and immaterial.

(Testimony of M. V. Pitts.)

The COURT.—I sustain the objection to that offer.

Mr. LIST.—Exception. Second, I also offer to prove by Mr. Winter and also by Mr. Pitts that they [192—157] found a car there similar to the one involved in this case loaded with logs, and the handhold was applied near the top of the endsill, and the car was loaded with logs; that there was just practically three inches clearance between the logs and the handhold, and that if the logs shifted as much as one inch, which it was testified is likely to occur at any time, the logs on that car would have completely fouled the handhold on the end of the car, and it was so admitted by Mr. Hazen, Northern Pacific inspector, in the presence of Mr. Pitts and Mr. Winter.

Mr. WINDERS.—I object to that offer as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

Mr. LIST.—Exception.

(Recess to 1:30 o'clock P. M.)

Afternoon Session, 1:30 o'clock.

Continuation of proceedings. All parties present.

Testimony of R. M. Crosby, for Defendant.

R. M. CROSBY, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Your full name is R. M. Crosby? [193—158]

A. Yes, sir.

(Testimony of R. M. Crosby.)

Q. What is your official position with the Northern Pacific, Mr. Crosby?

A. Mechanical superintendent.

Q. Mechanical superintendent of what territory?

A. The Western territory.

Q. As mechanical superintendent what is your duty and authority?

A. I have charge of the rolling stock. The rolling stock and machinery comes under my jurisdiction, which includes cars, locomotives and machine tools, and everything in the mechanical lien.

Q. You have under you master mechanics?

A. Yes, sir.

Q. On each division? A. Yes, sir.

Q. And they have their subordinate officials?

A. Yes, sir.

Q. How long have you been connected with the mechanical department of the Northern Pacific, Mr. Crosby? A. Nineteen years.

Q. What has been your railroad experience?

A. In years?

Q. Yes, sir. A. Forty-one years.

Q. You have worked, have you, as swiper and fireman and engineer?

A. No, I never worked as a fireman or engineer. I was shop man. I learned my trade in a shop. I have ran locomotives. [194—159]

Q. You came up through the shop?

A. Yes, sir.

Q. You started as an apprentice in the shop?

A. Yes, sir.

(Testimony of R. M. Crosby.)

Q. Were you occupying this position on the first of July, 1922? A. Yes, sir.

Q. I wish you would state to the jury briefly and clearly so they can hear you, the conditions confronting the operations of the Northern Pacific so far as its equipment was concerned, so far as inspectors and car repairers were concerned, from the first of July up to the 2d of September, with particular reference to Auburn and Centralia.

Mr. HUGHES.—We object to that question on several grounds. One is that the question is too general, and the other ground is that is it immaterial whether it was convenient for the company to do this work or not. It is no defense and would simply be incompetent, irrelevant and immaterial.

The COURT.—I will overrule the objection.

Mr. HUGHES.—Exception.

Mr. LIST.—It may be understood, your Honor, that as to each witness introduced by the defendant we have an exception as to the testimony relative to the strike.

The COURT.—That is already so understood.

Mr. LIST.—I did not know whether it was understood as to all witnesses. [195—160]

The COURT.—It will be understood if it is not already so understood.

A. On the first of July, as practically everyone knows, and of course railroad men better than anyone else, the railroad employees right down to the wipers went out,—I think in Seattle a few wipers remained. So far as the car repairers and machin-

(Testimony of R. M. Crosby.)

ists and everything of that kind is concerned, they walked off the job. We had instructions not to hire any outside men, and as a result of that it devolved on the officers and men,—the few who remained,—of course the foremen,—car foremen,—in practically all cases remained to work. They did at Auburn and at points where Mr. Winter has mentioned. Besides the foremen, the work was largely done by other officers of the railroad. That condition continued up until July 18, when we started to hire a few men,—the best, of course, that we could secure. But, as you all know, the men that we could hire under those conditions, were not like the men that ordinarily do that work. However, we did get some good men after a while. We struggled along and did the best we could with what we had to do it with. The men worked long hours. The men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; couldn't work any more than that. We worked along in that way. Now, I have heard some matters brought out here in connection with the inspection of trains that really seemed inconsistent to me, in that the cars were not inspected in the way that they were ordinarily inspected when we have the regular organized [196—161] force of inspectors. That was true. We did not have the men to do it. The cars were assembled in the train, and they were inspected by these officers that I have mentioned. Sometimes prior to the train moving away,—as has been brought out

(Testimony of R. M. Crosby.)

here,—the hose were either severed,—generally I will say they were stabbed with a knife blade, not cut in two,—just a knife blade inserted,—and in one case we had 22 hose cut before we got out of Auburn. In other instances we had to go around,—the hose were filled with waste,—both the air hose and the steam hose. The refrigerator-cars here in Seattle we had to set them on the steam track and connect them up with steam so as to keep those men from filling them up with waste, and other foreign substances. Taking the whole matter, it was a question of endurance so far as the company was concerned. Everybody was working the constitutional limit. Every nerve was strained. There is no question about that. I don't know of anything that could have been done that was not done with the force available.

Q. You were trying to keep the freight traffic moving in and out of this country, were you, Mr. Crosby? A. Absolutely.

Q. Now, Auburn is a repair point, is it, Mr. Crosby? A. Yes, sir.

Q. On the 31st day of August, the evidence will show, on train leaving Auburn as was testified at 9:50,—as a matter of fact it registered out at ten,—he had on that twenty log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we [197—162] at that time on the 31st day of August have men available to put them in condition at Auburn?

(Testimony of R. M. Crosby.)

A. I would say no. We did have men, but not sufficient.

Q. It was the honest judgment of yourself and the other officials of the Northern Pacific that it was an absolute necessity to take those cars to Renton for the purpose of being repaired?

A. Yes, sir.

Mr. HUGHES.—Just a moment. We object to that and ask that it be stricken, on the ground that it is calling for a conclusion. If he sets out the facts, the jury of intelligent men can draw their own conclusion.

Mr. WINDERS.—I wanted to kind of cut the matter short.

Q. You sent a lot of cars to Renton, didn't you?

A. Yes, we sent out practically all our log flats to Auburn for,—I mean Renton.

Q. What was the situation at Auburn with reference to having the facilities and men to make those repairs at Auburn?

A. We had the facilities,—of course our stock was not complete,—but in so far as the facilities, if we had the men we could have taken care of a great deal more.

Q. Did you have the men to do it, Mr. Crosby?

A. No, sir.

Q. How many cars were you handling, do you know, through Auburn under load in August and September, approximately? A. Per day?

Q. Yes.

(Testimony of R. M. Crosby.)

A. I should say in the neighborhood of 2500.
[198—163]

Q. Was the force that you had recruited and were recruiting up to the 2d of September,—were they busy all the time, Mr. Crosby, on the equipment that was in the yard? A. Yes, sir.

Q. Now, Mr. Crosby, when was it that the Northern Pacific,—or was there any particular reason why the Northern Pacific did not start to hire any men until about the 18th of August,—18th of July, I should say?

A. Our purpose for not employing men was by reason of our having the hope, or an impression that the men would come to their senses and return to work. Our men who left the service did not do so because of any dissatisfaction that they had with the Northern Pacific. That is, they all gave me to understand that. I am pretty close to the workmen.

Q. Was there any of these men went back East at that time, Mr. Crosby, or not?

A. The chairman of the different crafts. I don't just know how many of them went either to Chicago or Washington for the express purpose of making a separate agreement in so far as the Northern Pacific was concerned, and were refused by Mr. Jewell. I was looking up some letters on that. I did not have time before I left the office. We have it on record.

Q. It was not until after those men returned that you tried to hire outsiders?

(Testimony of R. M. Crosby.)

A. I can't remember the date that they went down; I would not want to testify on that. I don't believe that we did.

Q. You were in and out of Auburn frequently during this [199—164] period, were you, Mr. Crosby?

A. During the early operation of the strike. I was there several days at one time, and nights.

Q. You were working there yourself?

A. Yes, more in connection with the locomotive department, however.

Q. You were familiar with the situation in Seattle? A. Yes, sir.

Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue having the standpoint of safety of the men and the safety of the equipment and the property in mind?

A. No, I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself.

Q. We haul a great many logs, do we not?

A. Yes, sir.

Q. And there are a great many bad order logging cars?

A. Yes, sir, that is the bone of contention.

Q. When you came into this courtroom, Mr. Crosby, had your attention ever been called to the fact that the handhold on the end of a log flat could

(Testimony of R. M. Crosby.)

be fouled so that there was not two inches clearance above the handhold?

A. Not on a log flat, but on lumber it has.

Q. You are familiar, of course, with our car construction? A. Yes, sir. [200—165]

Q. You have gone through the car construction department?

A. Yes, sir, I have. I have heard some evidence this morning that is not entirely correct on the construction of our cars.

Q. You have worked in car shops yourself?

A. I have had charge of the car shops. I never was a car repairer, though.

Q. Are you familiar with our log flat series bearing No. 61753, Mr. Crosby? A. Yes, sir.

Q. Tell the jury about the construction of that log flat, and log flats of that series. There are different series of log flats?

A. That is what is generally known as our standard log flat. I want to qualify what I said about hearing some testimony not entirely correct. It would carry the idea that all of the end sills on our log flats come up flush with the top of the deck. That is not true. Our standard, as our blue-prints show, is that the end sill is flush with the top of the side sill, and the deck comes on top of the end sill as well as the side sill. Now, then, the grabiron referred to, of course, is bolted to the end sill, and in order to get timber to bolt to, you have to get down below the top of the endsill, which would naturally bring the grabiron ordinarily about two inches be-

(Testimony of R. M. Crosby.)

low the top of the deck of the car, provided the car had two-inch decking. Now, ordinarily our cars have two-inch decking, but some of them do not. Some are a little scant two inches. Of course it is little and don't amount to anything. I thought I would mention that. But [201—166] two inches is what we figure on for car decking.

Q. Are you familiar with the log bunks on these cars, Mr. Crosby?

A. Yes, sir, I am putting on about five hundred of them right now,—equipping new cars.

Q. I will show you what purports to be a wheel report of the train containing that flat, which for identification I will ask to have marked Defendant's Exhibit "A."

A. I don't remember the number of the car.

Q. Well, it is marked here with this No. 61753. You don't know that? A. No.

Q. What is the fact, Mr. Crosby, as to bent brake staffs,—does the bending of a brake staff necessarily make it inoperative?

A. No, I would not say that it would.

Q. You have a great many bent brake staffs on log flats?

A. There are very few absolutely straight. We have absolutely very few straight ones. Nearly all of them are bent a little bit. When they straighten them they don't always get them straight.

Q. Are you familiar with the engine No. 1263?

A. Yes, that is a Y-2 engine.

(Testimony of R. M. Crosby.)

Q. Do you know where that engine was in August and September?

A. She has been working between Auburn and Seattle.

Q. Was she down on the Centralia-Tacoma Division? A. No.

Q. Has she been down on the Centralia-Tacoma Division for the last two years?

A. Not to my knowledge. Lou Detherow has been running that [202—167] engine about two years.

Q. Between Seattle and Auburn? A. Yes, sir.

Cross-examination.

(By Mr. LIST.)

Q. After the strike started, how many men were employed at Auburn yards and how many at the Centralia yards as inspectors and repair men?

A. That would be difficult to tell you. There was a great turnover at that time.

Q. Having in mind August 31 and September 2, at Auburn and Centralia respectively, just give your best recollection.

A. You mean including the officers?

Q. No, including the men who made inspections and made repairs to cars.

A. Well, the officers were doing that along with the men.

Q. I just wanted to know how many were doing that work,—whether they were special employees or officers?

(Testimony of R. M. Crosby.)

A. There wasn't very many. I was not down at Centralia. At Auburn it would only be a guess. Probably 15 or 20, something like that.

Q. That is in both the day and the night shift?

A. Yes, sir.

Q. You mean 15 or 20 inspectors or 15 or 20 inspectors and repairers?

A. Well, they were mixed; inspectors and repairers.

Q. Would all the inspectors do repair work?

A. Yes, they had to at that time.

Q. Does that include the inspectors who were out in the yard [203—168] and also those on the "rip" track?

A. We had very few men working on the "rip" track.

Q. Most of these were inspecting the trains that went out?

A. And making repairs on the trains that went out.

Q. The cars that were sent to Renton,—were they all sent from Auburn or also from Centralia,—along about August 31 and the 2d of September?

A. I have no record of any sent from Centralia, but naturally they would be sent because we sent log flats at that time for heavy repairs to Renton.

Q. Where would you draw the line between the cars that you would send to Renton and those that you would repair there?

A. A car that was pretty badly shook or required sills in normal times would go to Renton. Of course

(Testimony of R. M. Crosby.)

at this time a car with less repairs would go there. We would naturally send cars to Renton at that time that we would not send under normal conditions.

Q. Would you also have repaired at Renton the cars with what are known as penalty defects? You understand what I mean,—those defects covered by the Safety Appliance Act? Would you have repaired at Renton cars with defects covered by that Act as well as defects not covered by that Act? For instance, would you send it to Renton for repair if it had a bent grabiron?

A. No, we would not send it to Renton for a bent grabiron.

Q. You would not send any cars there just for a broken sill step, would you? A. No, sir. [204—169]

Q. You would not send any there for a broken lock link or coupler? A. Not ordinarily.

Q. Would you send any there for a ladder tread that was mashed up against the side of the box-car?

A. No.

Q. Would you when you sent cars to Renton that had to have heavy repairs, but also needed these light repairs, which could have been repaired in a minute,—would you make those light repairs to the penalty defects, before sending the car to Renton?

A. We would if we had time, but we had other more important work to do at that time, and it would be questionable whether cars going to Renton

(Testimony of R. M. Crosby.)

would receive the same attention as if going out on the main line for our regular traffic.

Q. There was no line drawn, really, between the character of cars which you repaired in your own yard and those that you sent to Renton, so far as the safety appliance defects are concerned?

A. Only in so far as what I have told you,—If we had a car going there that was shook up, why at that time the chances are that they would not be as particular with the car as they would be with a car that was going out in a commercial train.

Q. You mean in making the repairs to the safety appliances?

A. I am talking about safety appliances, or any other appliances.

Q. In making the repairs, in the yards, by the inspectors and officials that you had there, were they limited to the [205—170] safety appliance defects, or did they repair cars in other respects?

A. Oh, we put in brasses and oil boxes and such stuff as we had. The wheels were usually under loads. In so far as the safety appliances were concerned they would be taken care of by the men who possessed the most knowledge of that particular part.

Q. You endeavored to repair those at Auburn and Centralia?

A. We were repairing all the cars that we could at both places.

Q. What I want to get at, Mr. Crosby, is this: When you came to a safety appliance or a penalty

(Testimony of R. M. Crosby.)

defect, did the inspectors at Auburn or Centralia repair all of those that they could before making the repairs to the car on appliances not covered by the Safety Appliance Act?

A. They paid special attention to the penalty defects. We had all kinds of cars running,—cars that had cracked side sills, flat wheels, and loose pedestals,—all that sort of stuff.

Q. Those were not repaired at Auburn?

A. No, we were not doing any sill work.

Q. Or at Centralia? A. Or at Centralia.

Q. That was all done at Renton?

A. We figured on getting all done there that we could.

Q. Have you heard all the testimony in this case?

A. I think so, yes.

Q. Are you able to say whether or not you have any knowledge of these particular cars?

A. No, I never saw the cars. [206—171]

Q. For instance, referring to count one wherein the handhold on the end of the car was bent against the end sill, are you able to say whether or not that was sent to Renton for repair irrespective of any other defects?

A. No, I am not prepared to say just what that car,—I did not have charge of the record of the cars at that time. As a matter of fact, these cars that were looked over by the officers and the car foremen were got together and sent to Renton.

Q. Any cars that left Auburn or Centralia with

(Testimony of R. M. Crosby.)

knowledge of defects were sent out for the purpose of going to Renton for repair, were they?

A. Out of Auburn?

Q. Out of Auburn or Centralia. Did you have any other place that you sent them to besides Renton? A. Yes, we have South Tacoma.

Q. That you sent them to from Auburn and Centralia?

A. Well, there were some going from Auburn, but principally from Centralia to Tacoma.

Q. When you got your bills from the Renton Iron Works, or the Renton Repair Works—

A. Pacific Car & Foundry Company.

Q. —did they state the details of the repairs so that you would be able to tell what repairs were made to these cars at Renton?

A. Yes, they carried the regular record of work that was done. They had records of the cars that they repaired.

Q. They billed on the Northern Pacific for that work? A. Yes.

Q. You have records in your possession showing whether or [207—172] not they put on a handhold on a certain car or whether they supplied a coupling chain?

A. No, it would not show that. If it had a damaged end sill it would necessarily follow in the application of a new end sill.

Q. So that those bills are itemized bills and you could tell just what was done,—that is true?

A. I think so, yes.

(Testimony of R. M. Crosby.)

Q. Were records kept by yourself or officials at Tacoma of repairs made there at that time?

A. Yes. Now, let me correct that. They have a record of the cars, but we are doing work ourselves there. Without it was a foreign car, the chances are they would not show whether they applied a grabiron. They would have a record of the car coming there and leaving there.

Q. If you had a car going from Auburn to Renton to have a large number of repairs made on it, and you could put a handhold on at Auburn or connect up a coupling lever, wasn't it your practice to do that before the car went out? A. Yes, sir.

Q. In that case the car would not be sent to Renton for the purpose of making those particular light repairs?

A. Any repairs that we would make at that time would be temporary.

Q. In the interest of safety you endeavored to make those repairs?

A. We did everything we could in the interest of safety.

Q. You did endeavor to make such temporary repairs as would put the car in good condition so far as the safety [208—173] appliances were concerned? A. So far as we were able.

Q. You spoke about the construction of the 61,000 series of cars, about the blue-print showing that the end sill does not come up flush with the floor of the cars? A. Yes.

(Testimony of R. M. Crosby.)

Q. Do you want the jury to infer that you don't have any cars on which the end sill comes up flush with the floor?

A. We have some cars of that kind. I qualified my statement.

Q. I did not catch that, Mr. Crosby.

A. The point that I wanted to make there was: Mr. Weeks in giving his testimony,—I would infer from what he says that all of our cars were constructed as he stated. That is not true of all our cars.

Q. I think Mr. Weeks was only testifying as to the cars that he had seen.

A. I did not notice that he referred to the particular car that they found this grabiron on. I was wondering at the time why it was not brought out whether this car had that sort of an end sill on it. The cars, unless they are rebuilt, are repaired in kind. That is, a piece will be removed and used as a template. If they have got a template they put the end sill the same as the one that came off. The same is true of the decking. But in the event of the car being rebuilt, we make a survey and sometimes make changes in the general design of the end sill and other parts of the car. I might add here, though, that the Northern Pacific are pretty conservative [209—174] about making changes in equipment.

Q. You didn't want the jury to infer that you meant to say that Mr. Weeks was not correct when

(Testimony of R. M. Crosby.)

He said that some of your cars had the end sills up flush with the deck?

A. No, if he qualified that by saying some of the cars, that is all right; but I understood that he said all of the cars were that way.

Q. I did not so understand.

A. There are some cars, not only ours, but other people's cars.

Q. Now, you testified that a bent brake staff would not render a brake inoperative? A. Yes, sir.

Q. You mean to say that it could be so bent that the brake would not be inoperative?

A. I mean to say that it could be bent and still be operative.

Q. It could be bent and be totally inoperative, couldn't it?

A. Yes, it could be bent clean down onto the deck.

Q. Haven't you seen a good many bent so as to be totally inoperative?

A. I have seen them, yes. I would not say I have seen such a lot of them. But take brake staffs in logging service, they are frequently bent.

Q. They are frequently so badly bent that they are inoperative?

A. Oh, yes; they are bent so badly as to be inoperative some times.

Q. What did you want the jury to infer when you stated that a bent brake staff did not render a handbrake inoperative? [210—175]

A. I meant just what I said.

(Testimony of R. M. Crosby.)

Q. In what kind of a case? In any of these cases?

A. I don't know anything about these cases.

Q. Well, those are the cases we are talking about, Mr. Crosby.

A. I don't know how bad those brake staffs were bent.

Q. Then your testimony has no reference to any of the cases that are in suit here?

A. I was just talking about brake staffs in general; not tying down to any car or car number.

Q. You did not intend to convey the impression that Mr. Weeks was stating an untruth when he said the brake staff was so bent as to be inoperative?

Mr. WINDERS.—He said that he didn't see any of these cars.

The WITNESS.—I did not see the cars.

The COURT.—Objection sustained.

Mr. LIST.—What is the purpose then of his testimony?

Mr. WINDERS.—The purpose is to show that there are a great many brake staffs bent and don't make the brake inoperative. That is the only purpose of his testimony.

Mr. LIST.—We agree on that proposition.

Q. (Mr. LIST.) Mr. Crosby, I think that is all. Are you going to stay here through this trial?

A. I did not figure on staying any longer than I had to.

Mr. WINDERS.—I will keep him here.

(Testimony of J. J. McCullough.)

Mr. LIST.—No, you don't need to do that. I will excuse you, Mr. Crosby. I thought I might want you later.

(Witness excused.) [211—176]

Testimony of J. J. McCullough, for Defendant.

J. J. McCULLOUGH, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. How long have you been in the railroad business, Mr. McCullough?

A. About 35 years; between 35 and 36 years.

Q. At the time of this strike you were superintendent of what is known as the Puget Sound Division of the Northern Pacific?

A. Yes, sir; that included Seattle, Tacoma and Auburn, and the lines in between.

Q. And particularly the Puget Sound Division was created for the purpose of taking care of the switching in Seattle, Auburn and Tacoma?

A. Yes, sir.

Q. And the transportation between those points. How long have you been familiar with the handling and switching of cars, Mr. McCullough? Just tell the jury a little of your experience.

A. Oh, I began as a brakeman away back in 1888 on the Illinois Central, and without going along with the different lines, I put in about six or seven years as conductor and brakeman, possibly

(Testimony of J. J. McCullough.)

two years as brakeman,—and five years as conductor, and about six years as switch foreman,—not continuously, but at different times,—and yardmaster,—general yardmaster and night yardmaster, probably seven or eight years. I don't know just how those will add up. As superintendent eleven years, and trainmaster [212—177] and inspector of terminals, three or four years. It ought to add up 35 or 36 years.

Q. You have been a large part of the last twenty years handling terminals and switching?

A. Since 1894 exclusively.

Q. And during Federal control you were in charge of the switching movements and switching yards of all the railroads?

A. All the railroads in Everett, Seattle, Tacoma, inclusive, in the Puget Sound district here.

Q. Are you familiar with the various cars that are handled? A. Yes, sir; quite well.

Q. The switching of them and making up trains and inspection of trains?

A. If I did not know that, I would not know much of anything?

Q. In other words, you have supervision of all of that work?

A. Yes, and can do it myself if I want to.

Q. You are familiar with the situation that existed on the Puget Sound division particularly at Auburn and Seattle from July 1st to July 31st, 1922? A. Yes, sir.

Q. On July 1st what were you doing?

(Testimony of J. J. McCullough.)

A. On July 1st at 10:00 A. M. I was waiting to see what would happen. At 10:00 o'clock it did happen. Everybody quit,—all the car repairers, inspectors taking care of the equipment at Seattle, Tacoma and Portland. I believe about two old men stayed to work at Tacoma. I believe one at Seattle. Then we made the necessary arrangements, we called in volunteers. We had them [213—178] already consolidated. We got in touch with them and kept our King Street station working, and getting our passenger trains out of town. That is the first thing that we did that afternoon. The next morning I got over into Auburn and Kent. I found the situation over in Auburn,—I went out there July 1st and I found the car foreman, and the bridge inspector the only two men working in the yards inspecting trains. I started in about ten o'clock and helped them. I stayed there that night and the next day I took a little rest. That night I went on and I worked July 4th, day and night; worked continuously from that on up until August 20th.

Q. At Auburn?

A. At Auburn, inspecting and repairing freight-cars, from about five or six P. M. until seven or eight o'clock the next morning.

Q. Then you came in and took charge of your division?

A. Four or five days a week I would come in and handle my office.

Q. You were familiar with the conditions in

(Testimony of J. J. McCullough.)

Seattle and Auburn up to the 31st of August, were you, Mr. McCullough? A. Yes, sir.

Q. When was it that the company first started to employ new men?

A. We were directed to not do it, and I think that ban was lifted on either July 18th or 21st. I am not positive. I believe it was on July 18th.

Q. Just tell the jury now up to August 31st what the conditions incident to and surrounding the operations of the [214—179] Auburn yards were with reference to the inspection of trains and the making of repairs at that point, and in what way it was different from normal?

A. Under normal conditions and prior to July 1st, and at the present time there are four regular car inspectors working eight-hour shifts, and two or three other men doing light repairing and oiling and so forth. Probably somewhere between 20 and 25 men employed at Auburn inspecting cars and making light repairs and taking care of oiling boxes.

Q. When with reference to the cars being put on the train are these repairs made?

A. Normally?

Q. Prior to the strike. And now.

A. Most all the repairs were made on the repair track except small defects which inspectors would find.

Q. You are talking about during the strike period?

(Testimony of J. J. McCullough.)

A. No, now. During the strike there was no men working at all on the repair track, except what little work the repair men could do. We would go through and inspect these trains when they came in,—inspect them particularly for penalty defects,—repair all those that we could, and those that we could not we would tag them or mark them for the repair track. Sometimes there would be some cars with brasses needed. We would not have time to fix them. We would send them to the repair track. Some of the cars with an end knocked out, of course we couldn't do anything with that. Anything that we could fix, like grab handholds or bent brake staffs, or repairing brake shoes and cutting levers we would [215—180] repair them in the yard. When the train came in we would inspect it. One man would go down one side and another the other. We would mark or chalk these cars as we went along. Later we would come back and fix them. If we were called away to get a train out, which was the most important thing, we would leave some of those cars and go after the train. We went over and inspected for the same condition cutting levers, brake staffs, and such matters as we generally knew were made penalty defects.

Q. What was the last thing that was done by these inspectors?

A. After we got that done, when the engine backed down, two of us would go right down to the engine and turn the air on and walk back and inspect the air,—one would go to the caboose and the other go

(Testimony of J. J. McCullough.)

to the engine. We would watch the air gauge and see that they got 70 pounds of air.

Q. Would you and your fellow inspector be along this train when the train would pull out?

A. Always. I would say occasionally we would get a train ready and knew the air was working and the conductor was not ready to go for some reason, and we would know there was some other train waiting we would go to another train. We had lots of work and had to keep our eyes on it.

Q. During this same period up to August 31, what is the fact as to whether or not these train crews were keeping a pretty close eye on the equipment?

A. That was a fact that was well known and not disguised. [216—181] They frequently used to tell me about it and try to run a bluff on me about having a large number of cars leaving in a defective condition. I asked them to give me the car numbers, and told them if they found any cars defective I would be very glad to have them show me. I told that to the chairman of the Brotherhood Committee.

Q. Would they sometimes hold up the trains?

A. Once in a while they would falter around there about something.

Q. Were they particular about refusing to take the train out if there were any defects?

A. Oh, yes. Not all of them. Certain men. We would be particularly careful to see that everything was fixed. They would still be trying to find fault.

(Testimony of J. J. McCullough.)

Q. These questions that I am asking you are general questions. You did not see those particular cars yourself, did you?

A. You mean that the suit was brought on?

Q. Yes, sir.

A. No, sir. I might have seen them at other dates.

Q. Have you with you the wheel reports as made by the conductors on these three trains that are involved as moving from Auburn?

A. Yes, sir.

Q. Tell the jury what a wheel report is.

A. A wheel report is one or more sheets prepared by the conductor that gives the car number and initial and shows whether it is loaded or empty and the class of car,—box, scale, flat, gondola, or refrigerator,—whatever [217—182] it might be,—and station,—figure or number,—that he picked it up at and the station that he left it at, and the contents, where billed and where billed to. A copy is sent to the St. Paul car accountant's office, who keeps the mileage that each car makes and the location of the cars.

Q. Is this wheel report made up at the time the train moves, and does it accompany the train?

A. Yes, sir, the conductor—

Q. One copy of that would be sent into the superintendent's office?

A. Yes, sir.

Q. And one copy would be sent in to St. Paul?

A. Yes, sir.

(Testimony of J. J. McCullough.)

Q. They are both original copies?

A. Yes, sir.

Q. On the 31st day of August, 1922, were these wheel reports,—at least the superintendent's copy, duly sent in?

A. Yes, sir.

Q. And have been in the records of the company at all times since?

A. Yes, sir.

Q. And you have them with you, have you?

A. I personally took them from the records when you asked me to (handing papers to counsel)

Q. I thought you had marked these particular cars on here, did you, Superintendent McCullough?

A. I don't know whether I did. Yes, this car here (indicating). [218—183]

Q. Is this No. 68327?

A. That is it there. That is the only one on that sheet.

Q. That is the one that went out at 10:10?

A. Here (indicating) is the train that went to Tacoma with the coal car,—two or three flats,—two flats. This (indicating) is the one that went to Renton with the Renton bad order and six or seven carloads of logs that was alleged to be bad order.

Mr. WINDERS.—I will offer this in evidence as Defendant's Exhibit "A-2." It covers a train pulled by engine 1784 containing a number of log flats.

The COURT.—It will be admitted.

(Testimony of J. J. McCullough.)

Mr. WINDERS.—As Defendant's Exhibit "A-3" a wheel report covering the train pulled by engine 1263.

The COURT.—It may be admitted.

Mr. WINDERS.—And as Defendant's Exhibit "A-4"—

Q. (Mr. WINDERS.) Is that No. 1263 the same one they were talking about down in Centralia?

A. The same one.

Q. How long have you been familiar with the engine 1263, Mr. McCullough?

A. We have had that engine on the double track, as we call it, running between Auburn and Seattle and Auburn and Tacoma anyhow four years; may-be longer.

Q. Has that engine in the last three or four years ever been down operating between Tacoma and Centralia?

A. I don't think so.

Q. Your wheel report shows that operating between Auburn [219—184] and Seattle on the 31st of August?

A. The train sheet shows.

Q. Have you got with you the original engineer's record of the Company showing where that engine was operated on the 2d of September?

A. I have the engineer's time slip.

Q. When was that time slip turned in?

A. That time slip was turned in at the end of the day's work.

Q. Did you take that from the original records of the company to-day?

(Testimony of J. J. McCullough.)

A. Yes, sir. That is also the time slip of that same engine run by the same engineer on the 2d, 3d and 4th of September. That is the 2d there. I presume that is the only one you want. There is the 2d, 3d and 4th.

Mr. WINDERS.—I offer in evidence these sheets showing that engine 1263 was operating between Seattle and Tacoma on September 2d, 3d, and 4th.

The COURT.—It will be admitted.

Q. (Mr. WINDERS continuing.) Now, referring to Exhibit "A-2," that wheel report shows the various cars that were testified to here by Mr. Weeks and Mr. Winter as leaving at 9:50 from Auburn, doesn't it, Superintendent McCullough?

A. Yes, sir.

Q. Now, referring to car No. 67105?

A. Yes, sir.

Q. That is the eighth cause of action. What was the condition [220—185] of that car when it left Auburn?

Mr. LIST.—If the Court please, I object to that unless the witness has personal knowledge of it. I am perfectly willing to admit these wheel reports for the purpose of showing the movements, but not as to the condition of any car unless there is some one here that inspected it.

The COURT.—Objection overruled.

Mr. LIST.—Exception, please.

The COURT.—This report was kept in the ordinary course of business of the company?

The WITNESS.—Yes, the regular report of each train.

(Testimony of J. J. McCullough.)

Q. (Mr. WINDERS.) What was the condition of that car?

The COURT.—I am admitting the report. Is it kept in abbreviated terms so that the jury would not likely understand it?

Mr. LIST.—I think it is probably in symbol.

The COURT.—I will withdraw my ruling if it is kept in such form as a man would ordinarily understand it.

Q. (Mr. WINDERS.) Why was that car going to Renton?

A. For general repairs, together with twenty-three or twenty-four others just like it.

Q. Did they go in this same train?

A. Yes, sir; altogether.

Q. All bad order cars?

A. All heavy flat cars going to Renton shops to be repaired.

Q. You say that car was with twenty-three or twenty-four others in this same train? [221—186]

A. This report shows a total of twenty-four flat cars all together.

Q. Twenty-four flat cars were moved out as defective cars to Renton for the purpose of being repaired? A. Yes, sir.

Q. As a matter of fact, where did that car become in bad order, Superintendent McCullough?

A. The previous movements of this car No. 67105, was that it arrived in Tacoma on July 29, with a load of logs, and was unloaded and found bad order, and held out of service, and it accumu-

(Testimony of J. J. McCullough.)

lated with other bad order heavy repair cars and moved over to Auburn on the night of the 30th,—August 30th, and then moved the next morning,—the whole bunch of them,—to Renton shops.

Q. The same train with these loaded logs going to Narco? A. Yes, sir.

Q. In that train there was a total of twenty-three cars that were in bad order?

A. Twenty-four.

Q. They were not under load any of them?

A. No.

Q. At that time were you familiar with the situation existing in the Auburn yard so far as repairs were concerned?

A. Yes, sir, that is one of my chief businesses to keep in touch with it; although I had relieved myself as car inspector and car repairer.

Q. You had reinvested yourself in your duties and responsibilities as superintendent? A. Yes, sir.
[222—187]

Q. As superintendent did you have charge of that Auburn yard? A. Yes, sir.

Q. It was your duty to see that the cars moved through that yard? A. Yes, sir.

Q. Were there any facilities in Auburn at that time in connection with the general movement of freight through there, including the facilities and available men to make repairs on these cars in Auburn? A. Could not have been done; no, sir.

Q. Was there any other place that was more

(Testimony of J. J. McCullough.)

available to your knowledge at which these cars could have been repaired than Renton?

A. No, sir; not even South Tacoma.

Q. During this same period in addition to this day you had sent other cars to the Renton Car Works for repair?

A. Yes, sir, crowded them in as tight as we could. They built additional tracks to take them.

Q. What efforts had you used towards getting men at Auburn for the purpose of keeping equipment in repair and keeping commerce passing through there moving?

A. After we were authorized to employ men, almost everything was done to secure them; through advertising, men personally sent to different places,—I think we sent one man to Los Angeles or San Francisco,—I don't know which,—men were shipped in from all parts of the country. We had an office open in the Arcade Building in Seattle. Every newspaper carried one or more advertisements. We would hire any man,—didn't care what [223—188] he was,—to go out and get some of the work done.

Q. You have handled a good many log flats, have you, Supt. McCullough? I mean they have been moved under your supervision and direction,—personal observation?

A. I suppose about as many as any superintendent around this neck of the woods in the last ten years, yes, sir.

Q. Have you ever known of, or has complaint

(Testimony of J. J. McCullough.)

ever come to your knowledge, of the fact that logs on a Northern Pacific log flat had been so loaded as to foul the grabiron at the end of the car?

A. I have never seen such a condition, and no one has ever called it to my attention either.

Q. Had you ever heard it suggested until you went to look over the papers in this suit?

A. No, sir; that is, if I understand this complaint correctly that the log irrespective of the bunk had come down flat and firm on the end of the car and fouled the end grabiron.

Q. That is the complaint.

Mr. LIST.—No, that is not the complaint.

Mr. WINDERS.—The complaint, as I understand it, is that the log came down over the end of this car so that there was not two inches clearance above the grabiron and the log,—came within two inches of the grabiron.

The WITNESS.—Well, it would have to be flat and firm and solid on the deck to do it; and with the log bunks, I don't see how it could do it, unless the log was purposely chipped or hewn or extremely curved, and the log bent right down [224—189] like a man's pipe in two or three feet.

Q. (Mr. WINDERS.) It might be possible, I suppose, with a big knot on the end?

A. Oh, it might be possible, yes.

Q. But you have never heard of such a thing?

A. No, sir.

Q. In your work as a switchman and superintendent and yardmaster,—generally speaking and

(Testimony of J. J. McCullough.)

not applying to these cars,—have you observed bent brake staffs? A. Yes, sir I have operated them.

Q. Will a brake staff be inoperative merely by being bent?

A. No, sir; I have found a good many of them improved by being bent. I could get better use out of them.

Q. Of course, if you bend them far enough you can't use them.

A. No, if you make a fish hook out of them you cannot use them.

Q. You were familiar with the conditions in Seattle? A. Yes, sir.

Q. Do you know where this transfer track is?

A. Yes, sir.

Q. Where is that track with reference to being a public street?

A. The track itself is located within the boundaries of Whatcom Avenue between Hanford Street and Holgate Street.

Q. Franchise tracks?

A. Yes, about the center of what is known as Whatcom Avenue.

Q. Whatcom Avenue is a very wide street?

A. Yes.

Q. Two hundred feet wide? [225—190]

A. Yes, sir.

Q. Those tracks are maintained there by franchise from the City of Seattle?

A. Yes, they can be removed on 30 days' notice from the City Council if they want them pulled out.

(Testimony of J. J. McCullough.)

Q. Supt. McCullough, being familiar with the situation that existed in Seattle on the 31st day of August,—or rather on the 7th day of September,—would you say that it would be reasonable to have attempted to make repairs of any character upon that transfer track located, as it was, in the public street and not on the property of the company, and between the street car track and the paved portion of Whatcom Avenue?

A. It would be very unsafe, unless the men doing the work were heavily guarded.

Q. Would it, in your opinion, knowing the situation and the obligations of the company to the city and the officials of the city and the Government,—would it have been countenanced by anyone exposing the men out there at that time for the making of repairs? A. My impression is it would not.

Q. As a matter of fact, at that time the United States was trying to furnish protection, was it not?

A. Yes, sir, and we refrained from putting even inspectors out there. It was one of the last things that we would have done, because we did not want to put them there. We were afraid. [226—191]

Cross-examination.

(By Mr. LIST.)

Q. I think your testimony has reference solely to Auburn, hasn't it, and Seattle? A. Yes, sir.

Q. You know nothing personally about the situation at Centralia? A. No, sir.

Q. Now, the wheel reports that you have identi-

(Testimony of J. J. McCullough.)

fied,—I wish you would tell the jury how they were made? A. These wheel reports?

Q. Yes, how were they made, and when were they made?

A. The wheel reports were made just before the train departs.

Q. Made by the conductor or somebody else?

A. Well, at the present time?

Q. I am having in mind the one that you have in your hand, Mr. McCullough.

A. Yes, the company has arranged to have men,—yard clerks,—make these out and give them to the conductor for him to take and check over to save delaying the train.

Q. Those particular ones were made by the yard clerks?

A. I would not say whether they were or not.

Q. Well, from what information would the yard clerk make the wheel report?

A. From the same information that the conductor would make it if he was doing it. The yard clerk goes out and gets the car numbers and initials and the necessary information from the cars after the train is made up.

Q. He would start at the head of the train or the rear? [227—192]

A. Either end.

Q. Just go along and take the numbers and initials of the car?

A. When the yard clerk does it there are two,—one on one side and one on the other.

(Testimony of J. J. McCullough.)

Q. So far as the numbers and initials and destination of the cars go, how is that filled out?

A. That is filled out in the office. They bring in these initials, numbers, and classifications of the cars, and then in the office another clerk calls off the number of the cars, and the other consults the waybills from which he gets the information as to the destination and contents.

Q. Does that show the final destination of each car?

A. It shows the final destination if at a local point on the Northern Pacific. If on a foreign road it shows the junction.

Q. You have wheel reports showing the movement of certain trains out of Auburn on August 31?

A. Yes, sir.

Q. Will you just briefly refer to the wheel reports marked Defendant's Exhibit "A-2," for train No. 930 for August 31,—engine No. 1784? How many cars were in that train when it left Auburn?

A. 77 cars.

Q. What kind of a train was that, Mr. McCullough? A. We call that the local.

Q. Local between what points?

A. Between Seattle and Everett.

Q. Is that as far as the conductor would take that car? [228—193] A. Yes, sir.

Q. Does that show there just where every car was set out between those points? A. Yes, sir.

Q. Were all the cars in that train in bad order?

A. No, sir.

(Testimony of J. J. McCullough.)

Q. Did a good many of the cars contain freight,—a good many of them loaded?

A. Yes, here is one page,—27 cars of logs right here in one bunch. There were two cars of logs set out, apparently scratched off.

Q. Taking those that went out in the train, how many of those cars were loaded with freight?

A. 43 of them were loads.

Q. So that is not what you would call a hospital train, is it?

A. 29 being logs. No, sir, a local freight we would call it.

Q. Will you refer to Northern Pacific flat car No. 66150? A. Yes, sir.

Q. Was that a loaded or empty car?

A. A carload of logs going to Narco.

Q. Where is that?

A. Two or three miles the other side of Renton.

Q. So that that car was hauled past Renton and then unloaded and hauled back?

A. I would not say where it was hauled to after this train left it.

Q. Were any of those cars set out at Renton from this train? I will give you the numbers. [229—194]

Mr. WINDERS.—I will admit there was only one. That is the one in the eighth cause of action. The rest were all taken to Narco, which is the dump of the Northwest Lumber Company. It is just beyond Renton.

Q. (Mr. LIST.) Refer now to extra 1263.

(Testimony of J. J. McCullough.)

The COURT.—That is, you admit that those going to Narco were not moved for the purpose of repairs?

Mr. WINDERS.—Yes.

The WITNESS.—What train, did you say, counsel?

Q. (Mr. LIST.) Defendant's Exhibit "A-3," which is Extra 1263? A. I have it; yes, sir.

Q. What kind of a train was that?

A. That was a train of 28 loaded cars. One car of sheep and a good half of the rest of it was logs. Also coal and wheat.

Q. That was not a hospital train, was it?

A. No, sir.

Mr. WINDERS.—It is admitted that none of these trains were hospital trains.

Q. (Mr. LIST.) Take car No. 67219.

A. That car was moved from Auburn to Tacoma.

Q. Is that in the neighborhood of Renton?

A. No, sir.

Q. That went over to Tacoma? A. Yes, sir.

Q. Did it go any further than that?

A. Not with this load. That was the destination of it.

Q. Destination of the logs? [230—195]

A. Yes, sir.

Q. Refer now to the second cause of action,—Northern Pacific flat car No. 61585,—where was that car set out?

A. That was handled the same as the other;

(Testimony of J. J. McCullough.)

moved from Auburn to Tacoma. That was the destination. Unloaded there.

Q. Referring to the tenth cause of action,—Northern Pacific car No. 58618,—in the same train—

A. That car contained Company coal and was moved in this train from Auburn to Tacoma.

Q. That is where it was unloaded?

A. Very likely.

Q. Referring to Extra 1616, August 31, where did that train go?

A. This was a train moved from Auburn to Lester.

Q. Which direction is Lester?

A. Towards Ellensburg. East. Half way up the mountain, about.

Q. Northern Pacific flat car No. 68327, going in that train,—where did that car move?

A. That car moved from Auburn to Eagle Gorge.

Q. Where is Eagle Gorge?

A. That is a short distance east of Auburn.

Q. Is that in the direction of the Renton shops?

A. No, sir.

Mr. WINDERS.—I am not contending that any of these cars went to Renton other than this one car.

Q. (Mr. LIST.) Was it in the direction of any repair shop where you could repair it? [231—196]

A. No, sir; not particularly. If it kept on going it would come to some.

Mr. LIST.—Mr. Winders, you have not referred

(Testimony of J. J. McCullough.)

now to certain other wheel reports. Are you going to put another witness on and identify them?

Mr. WINDERS.—I have got them. It don't make much difference. Here is the other three; might as well introduce them.

Mr. LIST.—I just want one. That is all I care for.

Q. (Mr. LIST.) Mr. McCullough, I am going to hand you a wheel report and ask you if that is one that was made in the regular course of business like the other wheel reports? A. Yes, sir.

Q. And it covers what train?

A. It covers engine 1265.

Q. Engine 1265. I asked you what train,—number of train?

A. There is no train number shown.

Q. Don't you show the train numbers on those wheel reports? A. Yes, here it is. 969.

Q. That is the train number that Mr. Winter and Mr. Weeks have testified to, except they have it No. 1263 and that wheel report shows 1265.

A. This is train 969, engine 1265.

Q. Does that contain car No. 64036?

A. It does.

Mr. LIST.—I now offer this report in evidence.

Mr. WINDERS.—I haven't any objection to that.

The COURT.—It will be admitted.

Mr. WINDERS.—Might as well call it my exhibit. [232—197]

(Admitted in evidence as Defendant's Exhibit "A-6".)

(Testimony of J. J. McCullough.)

Redirect Examination.

(By Mr. WINDERS.)

Q. Mr. McCullough, if there is anything happens to a train from the point of origin to destination,—for instance from Auburn to Narco, or from Auburn to Tacoma, or from Auburn to Lester,—would that be shown on that wheel report?

A. Yes. Anything to any particular car, it is customary for the conductors to show it.

Q. If a conductor discovered anything in bad order or anybody got hurt or anything went wrong with the train, it would be shown on that wheel report?

A. There would be an abbreviated mark or some reference.

Q. Is there anything on those reports?

A. No, sir. Well, I will look and see. I didn't look particularly for that. (Looks.) Yes, sir.

Q. As to what car?

A. On Extra 1616, car 65520, logs, shows bad order.

Q. Is that a car that is involved in this suit?

A. No, sir.

Q. See if you find any more exceptions there on any of them.

A. This 969 leaving Centralia at 10:30 A. M. September 2d shows car No. 64177 as being bad order.

Q. Is that a car in suit in this case?

A. It is not so marked, no, sir. I don't think it is.

Q. Any others on that?

(Testimony of J. J. McCullough.)

A. Nothing more, no, sir.

Q. Is it the duty of a conductor to keep watch of the cars [233—198] in his train while it is in transportation? A. Yes, sir.

Q. Is it his duty to make a memorandum report on this wheel report of anything that is wrong?

A. Yes, sir, it is his duty,—both his duty and his brakeman's duty,—to frequently and at every opportunity inspect his train, even when they stop for water and coal or wait for other trains, to make frequent inspection of the cars in the train at all points, and watch them carefully between stations, for such things as hot boxes and brake beams getting down and dragging, or anything of that kind. He makes these notations on his report. He does that for his own protection and also according to instructions.

Q. Would he make a note of an uncoupling lever that was defective or a bent handhold?

A. If he discovered them; yes, sir.

Q. Is it his business to discover them?

A. It is his business as much as anyone I know of. He has got special instructions and regular instructions in the examination rules. It goes in his examination when he takes the examination.

Recross-examination.

(By Mr. LIST.)

Q. You have referred to about three cars that you say notations were made about some defects?

A. I think it was two.

Q. Are they all on one train?

(Testimony of J. J. McCullough.)

A. There were two trains,—one on each train is all I found. [234—199]

Q. This rule that you have been talking about,—the rule requiring the conductor and brakeman to give the train a thorough inspection,—that rule is winked at, is it not? A. It is not winked at.

Q. Are they required to make repairs?

A. Any repairs that they can make.

Q. What kind of repairs are they required to make?

A. Such as they have tools and materials to make.

Q. Anyway, if they found a car defective,—regardless of the character of the defect,—they would mark on their wheel report bad order?

A. If the conductor found a car with a sill stirrup gone, or a grab handhold missing, he has instructions to place a big placard with black letters,—hang it over that place until the car gets to the terminal.

Q. If they find any such a thing as a handhold bent or a sill step missing, I suppose they make a notation of that in the wheel reports?

A. Yes, and hang this placard on there unless they can remedy it.

Q. If they remedy the defect after they get up the line 50 or 100 miles they make a record of that on the wheel report?

A. I would not say that they always do, but they frequently do it.

Q. Isn't it a fact, Mr. McCullough, that they are

(Testimony of J. J. McCullough.)

very, very careless in making these notations, or they are rather winked at by the company,—the company don't really require that of the conductor?

A. No, it is not a fact, counsel. [235—200]

Q. If you find several defects on a car, would the conductor put a placard over each one of those?

A. No, sir; those placards are just for grabirons and sill steps.

Q. If he found a grabiron bent and a sill step missing, would he put a placard over each one?

A. We would put two if they were in different corners. They are put there as a warning for the men going up against that particular corner.

Q. Suppose you refer to the wheel report for train 930 out of Auburn,—engine 1784,—on the 31st?

A. Yes, sir.

Q. Have you got any notations on there about those 23 cars being defective and placarded?

A. No, sir. Those cars were billed to the Renton shops.

Q. I thought you said they went to some point beyond Renton. Didn't you say that these cars went to some point beyond Renton?

A. The other loaded cars.

Q. I am talking about the ones involved in this case?

A. Oh, yes, I understand.

Q. They went beyond Renton?

A. All except one.

The COURT.—Did you say they had defects?

The WITNESS.—I said this one car did.

(Testimony of J. J. McCullough.)

Q. (Mr. LIST.) Have you got any notation of that?

A. This one car is marked Renton shops,—that and 23 others. The conductor had a car waybill or some information showing that those cars were going to the Renton shops.

Mr. WINDERS.—He has not testified there was any [236—201] other defective cars.

The WITNESS.—No, I thought we were here the last couple of days to show those were not defective.

Q. (Mr. LIST.) And you only had one car in that train in bad order?

Mr. WINDERS.—I said there were 24 bad order cars in there going from Auburn to Renton. You men got the numbers mixed. Of those numbers that you got only one of them was in bad order.

Q. (Mr. WINDERS.) The conductor would know that these 24 were bad order cars?

A. Yes, sir.

Q. From the billing in his hands?

A. Yes, sir.

Q. So far as these other cars they are suing us about, there is no memorandum on that wheel report showing any defects, is there?

A. No, sir.

Q. On the four or five of those cars that they said the hand brakes were bent,—they did set these cars out at Narco?

A. Yes, and unloaded them there.

Q. In unloading them,—from your experience and understanding,—would those men have run

(Testimony of J. J. McCullough.)

onto those four or five hand brakes that could not be turned?

A. They would find them, yes.

Q. In a condition of that kind where a hand brake wouldn't work, would that in the ordinary course be covered by a memorandum by the conductor on the wheel report?

A. The conductor should do it. [237—202]

Q. Would they do it?

A. Yes, sir.

Q. They were not only left at Narco, but unloaded at Narco?

A. The regular crew took them on and they were unloaded.

Q. (Mr. LIST.) These placards are for the purpose of giving notice to the trainmen, are they not, Mr. McCullough?

A. Yes, sir.

Q. Of defective safety appliances?

A. It is part of the safety department's instructions to us.

Q. If the conductor had waybills and knew the cars were defective, how would he protect the trainmen if he didn't put on the placards?

A. He would not put on the placards unless they were penalty defects.

Q. Those are the only ones that he put them on for?

A. Yes, that is for that purpose.

Q. How about an uncoupling chain being broken?

A. They are not used for that.

(Testimony of J. J. McCullough.)

Q. Don't you consider that dangerous going in between moving cars and uncoupling them?

A. Yes, there is considerable danger attached to it.

Q. Will you look at your train sheet and tell us when this car got up to the point where it was unloaded?

A. I am afraid you will have to have Mr. Campbell do that.

(Witness excused.) [238—203]

Testimony of Samuel Campbell, for Defendant.

SAMUEL CAMPBELL, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Just state your name, Mr. Campbell?

A. Samuel Campbell.

Q. What is your business?

A. Train dispatcher.

Q. What does the train dispatcher have to do with keeping a record of equipment and the movement of trains?

A. Well he has to make a record of it on the train sheet, showing the names of the conductors, engineers and engine number, the number of loads, the empties, tonnage, and the time at each station where they have telegraph service.

Q. The train dispatcher, as a matter of fact, is the one that directs the movement of all trains?

(Testimony of Samuel Campbell.)

A. Yes, sir.

Q. You start the record when the train starts and you keep making it until you get through with the train? A. Yes, sir.

Q. (Indicating papers.) Are those the original records that were made on the day these trains moved? Are those the original sheets you and the other dispatchers were working on the day these trains moved? A. Yes, sir.

Q. Are those the records that were made on the 31st of August?

A. We have got sheets here for August 31, yes, sir. [239—204]

Q. All right. Now, let us turn to the sheets covering Extra 1784.

A. August 31. From what point?

Q. From Auburn. Extra engine 1784. Now, just for the information of the jury tell us what time that train left Auburn.

A. At 9:50 A. M.

Q. Where did you get that information?

A. From the operator.

Q. Will you please tell counsel,—I think he wants to know,—where cars Nos. 66150, 61611, 63242, 64764, 68347, and 67399 were billed to? Show what time they arrived at Narco.

A. You want that at Narco? Well, they don't have any telegraph service at Narco. You would probably have to get that off of his car sheet.

Q. Will the wheel report show it?

A. It should.

(Testimony of Samuel Campbell.)

Q. You don't show Narco? A. No, sir.

Q. What time did they get to Renton?

A. They arrived at Renton at 11:20 A. M. We only show the cars set out at Black River or the number of cars in the train at Black River. Then they show what they had at Woodinville. In this case that train went through. This train at Black River had 43 loads and 17 empties. At Woodinville it had 11 loads and 23 empties.

Q. Did it pick up any empties at Black River?

A. That would have to be shown on the car report. [240—205]

Cross-examination.

(By Mr. LIST.)

Q. What was the number of this last train,—
Extra 1784? Was the train number 930?

A. 930.

Q. It was a regularly scheduled train?

A. Yes, sir.

Q. (Mr. WINDERS.) Run by engine 1784?

A. Yes, sir.

(Witness excused.)

Testimony of M. G. Crawford, for Defendant.

M. G. CRAWFORD, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Mr. Crawford, what service are you connected with?

(Testimony of M. G. Crawford.)

A. Traveling car service agent of the Northern Pacific.

Q. What work do you do?

A. Mostly of a supervisory nature. Supervising and inspecting with respect to car service and transportation matters.

Q. Over what territory?

A. Spokane and West.

Q. How long have you been in the transportation business?

A. I have been in railroad work 25 years, and practically all of that has been in the transportation or allied departments.

Q. You are familiar with cars,—box-cars?

A. Very familiar with them. [241—206]

Q. Did you change your employment any after the first of July temporarily?

A. Yes, I changed it several times after the first of July.

Q. What were you doing August 31st?

A. I was inspecting cars in the Auburn freight yards on that date.

Q. Who was working with you?

A. Mr. Burnham and Mr. Chittenden.

Q. I am talking about the 31st now?

A. I am not sure that Mr. Chittenden was there on the 31st. There were some changes in the official staff.

Q. You were working anyhow with Mr. Burnham? A. With Mr. Burnham, yes.

Q. Did you work at nights?

(Testimony of M. G. Crawford.)

A. I was working days.

Q. Did you on the morning of the 31st day of August assist in inspecting the train which has been referred to as going out to Narco, pulled by engine 1784, leaving according to the dispatcher's records at 9:50 and according to the wheel report at 10:00; and train leaving there at 10:10, engine 1616; and train leaving there at 10:20, engine 1263? You have looked over these wheel reports have you, Mr. Crawford? A. No, I have not.

Q. You have checked over these cars and the time the trains left? A. Yes, sir.

Q. Were you assisting in inspecting those trains that morning?

A. I was one of the inspectors on duty that morning during [242—207] those hours. I am not able to state which of the trains that I had anything to do with.

Q. Well, do you remember in the morning of inspecting this Local that went down to Renton? Is that part of your duties, or was it part of your duties while you were there?

A. I remember on several mornings that it fell to me to handle that train, yes sir.

Q. Just tell the jury whether or not the inspections up to August 31st was being done by men drafted into the service from the official family?

A. I would not say drafted. My services were voluntary.

Q. I mean they were being performed by men from other departments who had volunteered their services? A. Yes, sir.

(Testimony of M. G. Crawford.)

Q. Do you remember seeing Mr. Weeks and Mr. Winter out there?

A. I saw Mr. Winter and talked to him. I never saw Mr. Weeks at that time.

Q. Did you ever see Mr. Weeks out there with Mr. Winter along any trains that you inspected?

A. No, sir.

Q. On the inspection of those trains,—you and the men with you,—how long prior to the departure of the train would you be with the train?

A. Referring now to this particular No. 930, engine 1784, with 77 cars, some one of us or some two of us would probably be with those cars which would eventually form that train as long as three hours before the departure.

Q. I mean how long would you stay with them with reference [243—208] to the train leaving there?

A. We would stay until the train pulled out, and we would still be inspecting it as it pulled past us.

Q. Would there be anybody with you?

A. Yes, we usually worked at least two of us together; sometimes more.

Q. Now, would you inspect these cars with reference to making repairs on grabirons and brake levers and brake staffs with reference to the train moving out? A. That would be done—

Q. Talk over so the jury can hear you.

A. That would be done in this two or three-four

(Testimony of M. G. Crawford.)

period prior,—immediately prior to the departure of the train.

Q. Would that work be carried on after the cars had been switched into the train?

A. Yes and no, because a good many of those cars were inspected on the incoming train and slight repairs made on the incoming train.

Q. Would there be some of them that you would find repairs to make in after they had been switched into the outgoing train? A. Yes, sir.

Q. What character of repairs did you make at that time when the cars were all made up to go out?

A. I remember particularly straightening out grabirons in order to get the necessary clearance of two inches all around. I remember particularly straightening brake staffs, applying brasses, applying brake shoes, and fixing uncoupling devices so they would operate.

Q. Have you done that both before and after the cars had been switched into the trains? [244—209]

A. Yes, sir.

Q. What was the situation out there around about the first of September? Just tell the jury with reference to the work and with reference to the trains going out, and the conduct of the conductors,—of some of the conductors,—and brakemen in taking out their train. You were there. Tell them.

A. In the first place we were doing a very large volume of business. The Auburn terminal was as

(Testimony of M. G. Crawford.)

busy then as probably it ever was or ever may be again. The attitude of the trainmen was most critical. I mean by that that they departed from their regular path of duty to inspect and examine. I have seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily, and would refuse to do if they were told to do it ordinarily. So that, in addition to our inspection, which was close, we had the assistance in that way of the conductor and his three brakemen. And, as I say, they were most particular to find a defect. It was not always a defect which amounted to anything; but if it was anything they could kick about, they took the occasion to do so, and we either repaired the car without dispute or carded it "bad order" and had it sent out of the train. The inspection force consisted almost entirely of the officers of the company, and there was some interference from outsiders,—a great deal of interference from the people who were apparently our employees,—in connection with the operation of the air brakes on the train and other matters pertaining to the cars. [245—210]

Q. Mr. Crawford, are you familiar with the clearance necessary for grabirons,—handholds,—and for the necessity of hand brakes working on cars? A. Yes, sir.

Q. There was not any record kept of the trains you inspected or of the cars that you repaired?

A. No, sir, I don't know of any such record.

Q. Do you know of any of these cars,—any cars,

(Testimony of M. G. Crawford.)

—going out of there on the 31st day of August on this Narco train, or the train that left twenty minutes later than that, or the train that left ten minutes later than that over to Eagle Gorge, having any defects such as complained of here in this suit?

A. No, sir.

Cross-examination.

(By Mr. LIST.)

Q. Mr. Crawford, how many employees and officials were inspecting cars there on the 31st?

A. I think three on the day shift.

Q. What were the hours of the day shift?

A. Oh, in a general way, from 7:00 A. M. to 7.00 P. M., but we worked over hours.

Q. Three besides yourself?

A. I am only sure of two besides myself at that particular time.

Q. You stated that several times you inspected train No. 930 before it went out. Did you do that on August 31st? A. I am not able to state.

Q. As a matter of fact, Mr. Crawford, you would not be able [246—211] to state whether you inspected 1263 on that day, would you? A. No, sir.

Q. Or Extra 1616? A. No, sir.

Q. You simply went down there and made what inspections you could and repaired what you could, but you made no records of anything.

A. Well, all three of us were moved around from train to train. I could not affirm which particular train of those three that I expected at that time.

(Testimony of M. G. Crawford.)

Q. Were other trains leaving there besides these trains?

A. I have not examined the records. I imagine there were.

Q. As a matter of fact, there were a good many trains out of there in the forenoon?

A. Very busy.

Q. Between eight and eleven o'clock?

A. A very busy part of the day.

Redirect Examination.

(By Mr. WINDERS.)

Q. Were there any trains that went out of the yard that were not gone over by the inspectors and these defects taken care of, to your knowledge?

Mr. HUGHES.—Just a moment. He could only testify as to whether he did anything.

The COURT.—Objection overruled.

A. We three inspectors worked so closely together that there was no possibility of a train getting out without our inspection. [247—212]

Q. (Mr. WINDERS.)—In fact the engineer would not depart without an air test. In other words, there had to be two of you that went over every train that went out? A. Yes, sir.

(Witness excused.)

Testimony of J. L. Burnham, for Defendant.

J. L. BURNHAM, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Just state to the jury your name?

A. J. L. Burnham.

Q. What is your official title with the Northern Pacific? A. Assistant general freight agent.

Q. Of what territory?

A. West of Montana.

Q. West of Paradise?

A. West of Montana. West of the Idaho state line.

Q. How long have you been connected with railroad work, Mr. Burnham?

A. About 18 years.

Q. During 1922 you were located in Seattle?

A. Yes, sir.

Q. With Mr. Coman. Mr. Coman was the Western traffic manager and you were assistant to Mr. Coman? A. Yes, sir.

Q. Did you do any work in the Auburn yards in July and August? A. I did.

Q. When did you go out there, Mr. Burnham?
[248—213]

A. I think it was July 25.

Q. Were you working there on the 31st of August? A. Yes, sir.

(Testimony of J. L. Burnham.)

Q. What were you doing?

A. Car inspector.

Q. Were you working with Mr. Crawford?

A. Mr. Crawford.

Q. You boys were handling the day and night inspection on the 31st? A. Yes, sir.

Q. You have heard the evidence as to these cars that went out on these particular three trains,—one at 9:50, one at 10:10, and one at 10:20 in the morning? A. Yes, sir.

Q. Tell the jury in reference to the departure of the train what you would do in reference to the inspection and repair of cars?

A. Well, when the train was made up, two of us would get together and start from one end. One would carry a bar and one would carry a monkey-wrench. We would start down and make a general inspection of the train from one end to the other and couple up the hose and make any minor repairs that were necessary. If we found any defects which it was not possible to repair, then we would "bad order" the car and ask to have the car taken out of the train.

Q. Did you find that after the cars were switched into the train, Mr. Burnham, any cars that had the brake levers loose or the lading shifted against the brake staff, or the brake staff bent or the grabirons bent? [249—214]

A. After the cars were switched in?

Q. Yes. A. Occasionally.

Q. Would you make the repairs?

(Testimony of J. L. Burnham.)

A. If we could, yes, if it was possible to do so.

Q. If not would you let the car go forward?

A. No, sir.

Q. Were there any trains went out of there on the morning of the 31st of August that either you and Mr. Allmain, or you and Mr. Crawford did not inspect? A. No, no, not that morning.

Q. How late with reference to the departure of the train did you stay with the train?

A. We would stay until the engineer had given us a signal it was O. K.; that is after the air test had been made.

Q. Would you inspectors have to couple up the air hose between the cars? A. Yes, sir.

Q. Then after you had gone over your train you would have to give the air a final test, would you?

A. Yes, sir.

Q. Would you be on the ground along this train as it was pulled out of the yard, Mr. Burnham?

A. Not always. It all depended on whether there were other trains ready to go out. As soon as we got the O. K. from the engineer, we let the train go; but we always kept an eye on it.

Q. What was the attitude along about the 31st of August of the train crews with reference to taking out trains? Was it critical or otherwise?
[250—215]

A. They were very critical. As a matter of fact, the train crews generally did as much inspecting as we did. The intention was to delay the movement of trains as much as possible. That was

(Testimony of J. L. Burnham.)

the impression we gained,—the only impression that we could gain after what we saw they were doing.

Q. At that time were your trains being held up by these crews claiming something was wrong?

A. Yes, sir.

Q. Was that a common occurrence?

A. That was a common occurrence on train 930.

Q. That is this train that went out to Narco?

A. Yes, sir.

Q. Just tell the jury about what conditions were around there at that time, Mr. Burnham?

A. The other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen. That is, they tried to make it appear that the inspection which was being made by the men that were there was not effective, and they even went so far as to cut the hose after we had,—I will have to explain that first before I get into that. The first thing we did, we asked the engineer to apply the air. Then we went along the train and made an inspection of the hose to see if there was any leaky hose or anything else that might appear. Then we asked the engineer to release the air. We would find in some cases that after the air had been applied angle cocks had been turned, or sometimes if we happened to be in the center of the train,—a train of 75 cars,—some way or other the angle cocks at the rear of [251—216] the train were opened up so the brakes were not

(Testimony of J. L. Burnham.)

effective. As a matter of fact, they hindered us in every way possible.

Q. From your inspection and the examination of those trains on the 31st day of August, was there any of those cars that when they finally left Auburn yard to go out on the road that were missing grab-irons or had brake staffs so bent that they could not operate, or on which uncoupling levers were in bad shape?

A. No, sir.

Q. You volunteered your services out there, Mr. Burnham?

A. Yes, sir.

Q. You know up to that time from your experience that anything of that kind might happen, a train might be stopped any place by these train crews until something was done?

A. Oh, yes.

Q. Did you ever see Mr. Weeks and Mr. Winter out in the Auburn yards? Did you see them on this day?

A. I did see one man crossing the tracks, and I made inquiry as to who he was. They said it was a Government inspector. I don't know whether it was Mr. Weeks or Mr. Winter.

Q. Did you ever see them together?

A. No, sir.

Q. You were inspecting cars at that time, were you, Mr. Burnham?

A. Yes, sir.

Q. When you saw this man did you see him get

(Testimony of J. L. Burnham.)

up on any of the cars or make any measurements or anything of that kind? [252—217]

A. No.

Cross-examination.

(By Mr. LIST.)

Q. That was your first experience inspecting cars, was it?

A. Yes, sir.

Q. You were asked if you inspected all trains before they left Auburn the morning of the 31st?

A. I did not understand Mr. Winders in that way. He asked if myself and Mr. Crawford or myself and Mr. Allmain inspected them.

Q. Your reply was that you did on that day?

A. Yes, sir.

Q. What did you mean when you said on that day and emphasized it?

A. I had no particular reference to make. I don't know why I did say that day particularly.

Q. Do you mean that every day you were out there you inspected every train that went out?

A. No, I won't say that. It would be impossible. There are some trains leaving there close together, and we had four to six men. It would be impossible for one man to inspect all the trains.

Q. So that you and Mr. Crawford and the other gentlemen did not inspect every train. As a matter of fact, you don't know whether you inspected the three trains involved in this case on the 31st or not?

A. I know I inspected 930.

Q. Every morning?

(Testimony of J. L. Burnham.)

A. I did for three weeks.

Q. With Mr. Crawford? [253—218]

A. Not with Mr. Crawford.

Q. Who did you make that inspection with?

A. Either Mr. Allmain or a man named ———.

Q. That is the train in which all these defective cars were being hauled to Renton, I believe you said?

A. Yes, sir.

(Witness excused.)

Testimony of B. H. Allmain, for Defendant.

B. H. ALLMAIN, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Mr. Allmain, what is your employment with the Northern Pacific?

A. Roadmaster.

Q. How long have you been connected with the Northern Pacific?

A. 23 years.

Q. How long have you been roadmaster?

A. 10 years.

Q. You live at Auburn?

A. Yes, sir.

Q. The roadmaster has charge of the upkeep of the road?

A. Yes, sir.

Q. And has section men under him?

(Testimony of B. H. Allmain.)

A. Yes, sir.

Q. And foremen and so on. Did you do any work during this strike period at Auburn? Were you working there on the [254—219] 31st day of August?

A. Yes, sir.

Q. Were you working with Mr. Crawford and Mr. Burnham?

A. Yes, sir.

Q. Inspecting cars that morning?

A. Yes, sir.

Q. Did you in connection with these other gentlemen on this morning inspect these trains that have been referred to?

A. Yes, sir; I did.

Q. Henry, just tell this jury what you did at that time when you would make your various repairs and when you would finally leave the train, if you found any defects?

A. We inspected the trains as they came in, and as they were switched out. We made minor repairs, what we could, and also when the train was, —when the cars were switched into the train and were going out we inspected the train. I was on one side and one of the other men on the other side. One of us had a pinch bar and one of us a large monkey-wrench, and if we found any defect, such as bent handholds or grabiron or brake staffs, we would straighten them before the train started out.

Q. If there was anything that you could not do, what would you do with the car?

(Testimony of B. H. Allmain.)

A. We had the car switched out and set for the "rip" track.

Q. Were the train crews that were taking out these trains on the 31st of August and prior thereto keeping a pretty close check on the cars that were on their trains?

A. What is it?

Q. I say were the train crews,—the conductor and brakemen,— [255—220] were they checking up on you pretty close?

A. Yes, sir, they were. They were checking us very close. They even held the trains and would not move until some defects had been corrected.

Q. On any of those trains that went out would you have to couple the air hose or help couple the air hose between each car?

A. Yes, sir.

Q. On any of those trains that went out,—when they finally departed from the yard,—was there any condition such as testified here,—with brake staffs so bent that they would not work, or hand-holds on the side of these flats bent in flat against the car, or the lading on the car over on top of the brakes so that they would not work,—were any cars permitted to go out in the trains in that condition?

A. No, sir; positively not.

Q. Was there any interference with your work out there at that time during the strike period?

A. What is that?

Q. I say was there considerable interference with the work?

(Testimony of B. H. Allmain.)

A. There was considerable.

Q. After you had your trains made up and tested—

A. After we had them tested, we would find our hose cut and something done. We, of course, didn't know who did it. We had considerable interference.

Q. Now, Henry, you have taken care of and are very familiar with the track layout?

A. I don't take care of the Auburn track. My district is north. [256—221]

Q. Are you familiar with the location of the tracks?

A. Yes.

Q. Can you tell this jury the approximate distance between the leads over which the cars coming,—we will say,—towards Renton,—which would be towards Seattle,—and the distance from the lead over which that train would finally get out of the yard, and the distance from the lead to the lead over which trains finally going out to Tacoma would go over?

A. Well, the yard is approximately two miles long, and the trains going north to Renton,—that is toward Seattle?

Q. That is toward Seattle.

A. There are sometimes 70 or 80 cars, or 90 cars on that siding, and there is still room and would be room for another train the other way. That is, with a few cars.

Q. What is the length of the ordinary log flat?

(Testimony of B. H. Allmain.)

A. Approximately 45 or 50 feet; different lengths.

Q. 40 to 50 feet?

A. 40 to 50 feet. 30 or 40 or 50.

Q. This train 930 with 70 cars would extend for some 2800 feet?

A. Yes, approximately.

Q. Now, do you know whether the cars coming to Seattle came out of the north end of the yard?

A. Yes, sir.

Q. Just a block or so below the depot at Auburn proper? Now, the trains going to Tacoma,—I don't know whether you know or not,—do you know where they go out of the yard,—this yard that is two miles long,—how far is the point where the engine goes off those switch tracks onto [257—222] the main line from the point where the engine goes off the switch tracks onto the main line in the north end,—do you know?

A. Well, the train going to Tacoma at times,—the Tacoma trains leave sometimes on track 5 and 6.

Cross-examination.

(By Mr. LIST.)

Q. Mr. Allmain, you made these inspections with Mr. Burnham and Mr. Crawford?

A. Yes, sir.

Q. You testified that on August 31st no cars went out in the condition we have been talking about?

A. I did.

Q. Had you found a defect such as a missing brake wheel, would you have repaired it,—a brake wheel to a hand brake?

(Testimony of B. H. Allmain.)

A. We would if we could.

Q. Well, if the brake wheel was off, what would have prevented you from putting on a new brake wheel?

A. If the brake wheel—

Q. Yes, could you put on a new brake wheel?

A. We would. We could put on a new brake wheel if there was nothing else the matter with it.

Q. Nothing else the matter with the car or with the brake staff?

A. With the brake staff.

Q. Can you tell us why you did not put on a new brake wheel on Northern Pacific car 67105? It is admitted that it went out that morning on train 930 without a [258—223] brake wheel?

A. I don't believe there was one.

Redirect Examination.

(By Mr. WINDERS.)

Q. There was about twenty "bad order" cars went to Renton that morning?

A. Yes, sir.

Q. You did not try to repair those?

A. No; that was the train where they were going to the Renton shop.

Q. You would not try to repair cars that were going to the shop?

A. No.

Recross-examination.

(By Mr. LIST.)

Q. You would not put a brake wheel on a brake staff even to make a temporary repair?

(Testimony of B. H. Allmain.)

A. What?

Q. You would not put a brake wheel on to simply make a temporary repair where the car was going to the shop, would you?

A. We would if there was any penalty defects so we could do it.

Q. Then I asked you why you did not do it in this particular case. Your answer was that you did not think it went out in that condition,—is that correct?

A. Well, I did not think it was. Of course, there were so many cars went to Renton for repairs at that time that had [259—224] to be repaired to go through heavy repairs, that we did not attempt to do that.

Q. You did not attempt to make the slight temporary repairs in view of the fact that it had to have heavy repairs later on,—is that it?

A. Yes, we made all the repairs that we could and that we thought was necessary,—penalty defects.

Q. That is what I was asking you about. I think you misunderstood me. Why didn't you put a brake wheel on this car when it went out on 930 that morning?

A. You mean a brake staff?

Q. No, only a brake wheel.

A. The staff?

Q. No, the wheel,—hand brake wheel.

A. That is hand brake staff.

Q. You have a hand brake staff and on top of that you have a little wheel?

(Testimony of B. H. Allmain.)

A. Yes.

Q. The staff was there, so far as the evidence shows, but the wheel was off?

A. Yes.

Q. Why didn't you put that on there before it went out in train 930 on the 31st of August?

A. I did not see it.

Q. You don't think it went out in that condition?

A. It may. I can't believe it. I didn't see it.

Redirect Examination.

(By Mr. WINDERS.)

Q. Would you have tried to put on a brake wheel on a car [260—225] that was marked for the Renton car shops for repair?

A. We would not attempt to make repairs to such a thing on cars that went to the car shops.

Recross-examination.

(By Mr. LIST.)

Q. Mr. Crosby then was mistaken when he testified that he always tried to make temporary repairs to cars before they left?

Mr. WINDERS.—I haven't any record that he so testified.

The COURT.—I sustain the objection. When you compare the testimony of one witness with a former witness you always produce a situation which leads to confusion.

(Witness excused.) [261—226]

Testimony of J. F. Alsip, for Defendant.

J. F. ALSIP, produced as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. What is your position with the Northern Pacific? A. Train-master.

Q. What are a train-master's duties, so the jury may know?

A. He has general supervision of the operation of trains on the district, including the station help and anything that pertains to the duties of a superintendent, in fact.

Q. How long have you been in the railroad service?

A. The total service is about 24 years this fall.

Q. 24 years this fall? A. Yes, sir.

Q. You were located with Mr. Nixon at Centralia? A. Yes, sir.

Q. Was he sent to Centralia at your request, Mr. Alsip? A. Yes, sir.

Q. Were you in charge there during this strike? were you in charge of this inspection work at Centralia? A. Yes, sir.

Q. Was Mr. Nixon there with you on the morning of the 2d of September when these locals went out that have been referred to? A. Yes, sir.

Q. Something was said by Mr. Nixon about penalty defects. Mr. Alsip, can you give this jury some idea of the number of penalty defects that an inspector can find on a box-car.

(Testimony of J. F. Alsip.)

A. I can't give you the exact number. I have talked to [262—227] different Federal inspectors, and men of our mechanical department. They claim there is somewhere around 200 or 240 defects that are claimed by the Government inspector to be penalty defects.

Q. On each car?

A. On a box-car. There are a few less on a low car such as a "Gon" or flat.

Q. There would be a few less? A. Yes, sir.

Q. That includes all the grabirons?

A. Yes, sir.

Q. What are some of the penalty defects?

A. Grabirons, stirrups and ladders.

The COURT.—Of course, the number is something that the jury can take into account in determining the opportunity of observation and the chances of detection by the different witnesses that have testified; but to go to work and enumerate them, I am afraid it would take too much time.

Q. (Mr. WINDERS, continuing.) Just tell the jury when you went to Centralia.

A. I was in Centralia on the morning of July 1st waiting and anticipating that the strike would be called,—that is, that it would become effective at 10:00 A. M. Every man in Centralia with the car foremen left in the yard, and I was left there alone. In the afternoon a man by the name of Campbell, who is our bridge and building supervisor, came at my request. The following day I appealed to the superintendent of the O. W. R. & N., who was very

(Testimony of J. F. Alsip.)

much interested in the operation of [263—228] Centralia Yard, to send a little help if possible, and he sent Mr. Nixon.

Q. The O. W. R. & N. and the Great Northern both operate over the same tracks?

A. A joint operation.

Q. And use the Centralia yards?

A. Yes, sir. In this situation we proceeded to try to run the railroad. I fired a boiler awhile and went down and got out some trains. I worked 52 hours without having my clothes off.

Q. On the 31st day of August you and Mr. Nixon were inspecting trains during the night until those cars went out that morning? A. Yes, sir.

Q. What were the conditions on that date,—that is the surrounding conditions, as to—well, as to your safety at night, and what was being done to your equipment after you had it examined and attempted to repair it?

A. I think probably we had as much interference at Centralia as any other one place in the Northwest territory. First of all, Centralia is a notorious place, as you know. We were continually interfered with in making up our trains and inspecting our trains and connecting the air. Even after we had passed one of our trains and given the engineer the signal to set the air and release the air we have found and been notified in some cases of malicious acts on the part of unknown persons which resulted in defects such as we are talking about now,—cutting levers, disconnected, air hose cut or

(Testimony of J. F. Alsip.)

[264—229] pulled apart, and in some instances the stirrups were bent off by the use of bars, same as we would use in straightening, and opening the angle cock to prevent our getting a full air pressure. And numerous other things such as Mr. Crosby spoke of, waste being placed in the hose,—and the gaskets taken out,—and numerous other things.

Q. Did you during this strike period see Mr. Weeks or Mr. Winter? A. Quite often.

Q. Did you see them together down there?

A. I saw Mr. Weeks and Mr. Winter quite often in Centralia Yard early in the morning, usually in this fashion; one man on one track and the other on the other taking the numbers and going over the cars and making their inspection and in the performance of their duties.

Q. Did they ever call any defects to your attention?

A. Yes, I remember one case in particular. Mr. Winter told me when I went up,—he was across the car,—that I had failed to straighten a grabiron; and I immediately went back and did that. I am quite sure that when I went up this day that he was on this particular case that I straightened it. However, as I said before, such interference as I have enumerated did happen and there was no way to prevent it. After inspecting and repairing defects and getting away twenty or thirty car lengths, there was nothing to interfere with an employee,—if so disposed,—bad ordering the car, causing the defect to again appear.

(Testimony of J. F. Alsip.)

Q. Did you at any time have Mr. Nixon make any repairs,— [265—230] light or otherwise, as the cars came into the yard?

A. No, we were not sufficiently manned to take care of any inspection on the in-coming train.

Q. Did you make any inspection or repairs prior to the cars being switched into the out-going train?

A. No, it was necessary for us, owing to the conditions and the lack of help, to wait until the trains were made up, and in most cases the road engine was on before we could reach the train and make our final inspection and couple up our air and make the air test.

Q. Did you, after these cars had been switched in and after your engine was hitched on, go along the train at that period and straighten bent grabirons and fix coupling levers?

A. Yes, sir, we carried as the other gentlemen have stated, a bar and wrench; and we straightened grabirons and stirrups, and we carried some wire with us to make the connection of a lot of disconnected cutting levers, and things of that sort.

Q. Tell us how far toward Tacoma,—which is the direction these trains went except one,—is the other end of the yard,—that is, how far is it from the other end of the yard toward Tacoma from the point a quarter of a mile from the depot that has been referred to in the evidence in this case?

A. The lead switch on which the train going to Tacoma enters the main track is about a mile and

(Testimony of J. F. Alsip.)

a quarter from this location referred to as a quarter of a mile east of the passenger station.

Q. That is all yard tracks in there? [266—231]

A. Yes, sir.

Q. Did you make up your trains and make your repairs on any particular track?

A. Anywhere we found them.

Q. Anywhere you could get the train made up,—any track?

A. Yes, sir. With the exception that we had to have regular tracks that we tried to make certain trains on for this reason, a large train must have a long track and a short train can be accommodated on a short track. That would govern in some cases.

Q. There is quite a log movement into the Grays Harbor and Willapa Harbor country, is there not?

A. Very heavy.

Q. You have been familiar with that a good many years? A. Yes, sir.

Q. Is it your business to keep familiar with anything that would speed the operation of trains?

A. It is my business to keep in absolute touch with the situation at all times.

Q. How many years have you been familiar with that territory?

A. Since 1914. I have been familiar with the territory since 1909, but I have been on the road since 1914.

Q. Have you known, or has your attention been called to the fact, in hauling logs upon log flats into Willapa Harbor or into Tacoma, that the hand hold

(Testimony of J. F. Alsip.)

on the end of the car, such as is used by the Northern Pacific, was fouled so as not to have two inches clearance between the handhold and the logs over the top? [267—232]

A. No, I have not. I have known of cases where the side handhold had been fouled by the limb of a tree, but not the case that you refer to. If a log had a knot or some unusual growth beyond the bunk, it might rest on the deck of the car which is above the handhold, and the handhold is so placed as it has the required clearance as you speak of.

Q. Mr. Alsip, referring to Defendant's Exhibit "A-6" and "A-1" for identification, and one which I will call "A-7" for identification, are those the wheel reports covering the three trains upon which the complaint has been made as having moved out of Centralia? A. They are.

Q. They have been taken from the records of the company? A. Files of the office in Tacoma.

Q. Do you remember which one of these trains,—I guess you can pick it out,—has that car that they claim was fouled, Mr. Alsip?

A. No, I don't remember the car numbers, Mr. Winders.

(Mr. WINDERS hands paper to witness.)

Mr. LIST.—It is the 13th cause of action, car No. 61753.

The WITNESS.—Yes, it shows on this report.

Q. (Mr. WINDERS.) Is there any indication on that report that would indicate the character of log bunk that was on that car, Mr. Alsip?

(Testimony of J. F. Alsip.)

A. Yes, sir, it has a notation that the car was equipped with a common bunk.

Q. Tell the jury what a common bunk is and its dimensions.

A. A common bunk is a piece of timber varying in height [268—233] from six to eight inches and almost square, the width of the car, placed almost directly over the truck center and between,—that is between the truck centers on which the logs are loaded.

Q. How far is this bunk on this car in question from the end of the car, approximately?

A. Approximately, five feet.

Q. One on each end and then one in the middle?

A. Usually two in the middle; sometimes more.

Q. As a train man, you are directly responsible for the conduct of the men out on the road, are you not, Mr. Alsip? A. Yes, sir.

Q. Something has been said about these wheel reports. You have looked over these wheel reports in these three trains? A. In a general sense.

Q. What is the fact as to the rules and regulations and as to the duty of conductors in making those wheel reports, in making a memorandum of any bad order cars?

A. They are required to do so.

Q. Would that cover penalty defects such as are referred to in this case? A. All defects.

Q. You are out on the roads a great deal?

A. Continuously approximately.

Q. You are out on the roads for the very pur-

(Testimony of J. F. Alsip.)

pose of seeing that these trains move and the rules and regulations of the company are lived up to?

A. Absolutely.

Q. Do you know on the Tacoma Division or any other division [269—234] of this railroad where the company is winking at that regulation and not requiring the train men to make those entries?

A. I can only testify to my own division. We are not winking at it. We are requiring them to make them.

Q. Do you go out on the ground for the purpose of seeing that they do live up to this regulation, Mr. Alsip? A. All regulations.

Q. I don't know whether I asked you or not, but how were you being treated along this time when things got very critical about the 2d of September by the train crews when taking out their trains? Were they particular about the condition of their equipment when it went out of Centralia?

A. They were giving the trains as good an inspection as we could possibly give them, and they had instructions from their various officers,—their organizations,—to take records and report any cars that were not in shape and also to refuse to take them. In many cases they would delay the trains. I have seen trains in Centralia delayed as high as one hour waiting for some of us to come and make some minor repair or to have a car set out, and in some instances I have had to use this particular crew that was objecting to the condition of the car to make a set-out of the car, because the

(Testimony of J. F. Alsip.)

switch engines were not available. The situation,—the condition was very critical, especially at Centralia. That is borne out by not only the records but the news items during that time that we were not able to get help at Centralia, largely for the reason that Centralia [270—235] had a notorious reputation as an I. W. W. center. While a great many other points were supplied with help, we could not get men to go to Centralia. When we did, we only dared put them to work in the day time. That left Mr. Nixon and myself to work in the nights continuously. In fact, I was not released at Centralia until October 12th. I was continually in service from July 1st to October 12th. Only by the aid of my automobile we were able to keep up with the game. So far as the interferences were concerned,—

The COURT.—You have answered the question.

Q. Is there any evidence or any record as made by the conductors of these three trains at the time these cars moved from Centralia, of any of these cars that the Government is complaining about being in bad order any time from the time they left Centralia until they got to the point of destination?

A. There is not on these two reports. The gentleman has the other. There is a notation of a bad order car, but not the number referred to.

(Looking at paper.)

No, sir.

(Recess to 9:00 A. M. Thursday, June 21, 1923.)

(Testimony of J. F. Alsip.)

Q. (Mr. WINDERS, resuming.) Mr. Alsip, under the conditions that existed at Centralia at the time referred to, was there any facilities or were there any men under which anyone on this train where this log was alleged to have gone over the end,—under which that car could have been unloaded there in the Centralia yard? [271—236]

A. Not unless we would have made some special arrangement to dump them.

Q. You have already outlined to the jury the force you had? A. Yes, sir.

Q. Within a terminal of that kind under the schedule of the brakeman, could you require them to unload that car in the Centralia terminal?

A. Absolutely no.

Q. But out on the line at some point that was not a terminal to which this car was billed, and under their schedule and working arrangements, it was their duty to unload the logs?

A. Not exactly. It would be their duty to place it at a point where it could be unloaded.

Cross-examination.

(By Mr. LIST.)

Q. Mr. Alsip, we were talking about Centralia. Now, on September 2d, I wish you would tell us how many men you had there at that time making inspections and repairs.

A. Mr. Nixon and myself at night.

Q. Between what hours were they?

A. We did not have any stated hours. We went to work as a rule at six o'clock in the evening and

(Testimony of J. F. Alsip.)

worked through until the following morning, until the local trains had departed. Ordinarily it was our purpose to get them out by eight or eight-thirty. Oftentimes they ran until ten or eleven and as late as noon under the [272—237] circumstances.

Q. How many did you have on the day shift?

A. There were on the day shift at that time Mr. Dean and several new recruits. I could not just say how many. Three or four, I think.

Q. Now, taking the period before the strike, if a car had been loaded with logs and fouled the handhold at the end of the car, what would they have done at Centralia?

A. I am not clear as to how this log fouled the grabirons myself.

Q. If the end projected and came down and the handhold was fouled, what would they have done at Centralia before the strike?

A. I can't see how that could have happened.

Q. Well, I am asking you how it would have been handled at Centralia before the strike if it had happened.

Mr. WINDERS.—I object to that. If he never knew of such a case, how could he tell how it would have been handled?

The COURT.—Objection overruled.

A. If I undertand your question correctly, if this log was a bottom log, as it would have to be in this instance, it is presumed that it would have to be unloaded.

(Testimony of J. F. Alsip.)

Q. (Mr. LIST.) You never heard of them taking an axe and chopping out a clear space so the men could reach the handhold? A. No, sir.

Q. You never heard of that being done at any place? A. No, sir. [273—238]

Q. Did you ever see any bunks less than six inches? A. Possibly.

Q. You have seen a good many of these cars where the handholds were clear up as high as the floor of the car?

A. No, I never saw them that high.

Q. Would you say that you ever had one on your line? A. I cannot say as to that.

Q. You don't know anything about that, do you?

A. I am speaking about what knowledge I have; what I have seen.

Q. It has not been your duty to go around and inspect these cars and see whether they conform to a general standard?

Mr. WINDERS.—I object to the question.

The COURT.—Objection overruled.

Q. (Mr. LIST.) Has it ever been your duty prior to the strike, or is it your duty now, to go around and inspect these cars and see whether or not the handholds have been properly applied so as to be below the deck of the car?

A. Not except in cases where some special attention has been brought to a consideration of some particular car.

Q. It has not been any part of your duty to go

(Testimony of J. F. Alsip.)

around on the repair tracks and see whether those cars are properly repaired, has it?

A. It is my duty, and was then and prior to that, to have supervision over the repair track.

Q. I am not talking about having supervision over the repair track. I am talking about going around and actually observing and inspecting.
[274—239]

A. Yes, sir.

Q. If you saw a car with the top of the handhold near the decking of the floor, what would you do?

A. If I saw it?

Q. That is, if the top of the end handhold came up close to the top of the deck of the car and did not extend below there at least two inches, what would you do?

Mr. WINDERS.—I object on the ground that there is no statutory requirement, or any other requirement, that requires them to be two inches below the deck of the car.

Mr. LIST.—You forget that the testimony of your own witnesses is that lumber on these cars has repeatedly fouled the handholds.

Mr. WINDERS.—I have not heard any testimony like that.

The COURT.—Objection overruled.

A. If I should find anything in connection with the appliances on a car that was not right, I would immediately take some steps to have it remedied.

Q. (Mr. LIST.) That is not responsive to the question.

(Testimony of J. F. Alsip.)

(Question read.)

Mr. WINDERS.—So I may preserve the record, I renew my objection as it being incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Objection overruled.

Mr. WINDERS.—Exception.

The COURT.—Exception allowed.

A. Now, your question,—I don't fully understand,—if [275—240] you mean that if I found a handhold that was too close to the top of the car, what would I do?

Q. (Mr. LIST.) Yes, too close to the top of the car, so that if any logs or lumber on there projected over it would give less than two inches of clearance. What would you do?

A. If the car was loaded at that time?

Q. If the car was empty at that time, and you saw it was used with that kind of service and you saw that if it was loaded the handhold would be fouled,—what would you do?

Mr. WINDERS.—I object to that question, because there is not any evidence, and can't be any evidence, introduced in this case on the loading of lumber.

The COURT.—Objection overruled.

A. If the lading had fouled the handhold, as you speak of, we would shift the lading. If the handhold was improperly applied we would have it changed.

Q. (Mr. LIST.) Would you say that if the

(Testimony of J. F. Alsip.)

handhold was applied nearer than two inches to the top of the deck, it would be improperly applied?

A. Nearer than that?

Q. Less than two inches, Yes, sir.

A. According to the specifications, it is supposed to be two and two and a half inches.

Q. This should be changed before the car was put in service for lumber or logs?

A. If it was improperly applied, it should be changed while on the repair tracks. [276—241]

Q. Have you had occasion recently to make any changes in any such cars? A. No, sir.

Q. Have you inspected them? A. Yes, sir.

Q. Have you inspected any right down below here in the last 24 or 48 hours?

Mr. WINDERS.—His duties are on the Tacoma Division.

The COURT.—Objection overruled.

Mr. LIST.—I understood him to say that he made some inspections recently.

The WITNESS.—Not in Seattle. I am talking about Centralia.

Q. (Mr. LIST, continuing.) But if any cars came out of Seattle, going to Centralia, you would do the same work that you referred to?

A. If I saw them on the rip track or repair track.

Q. You don't think it is common practice to have those handholds improperly applied?

A. I know it is not.

(Witness excused.)

**Testimony of J. J. McCullough, for Defendant
(Recalled).**

J. J. McCULLOUGH, recalled as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. I just want to ask you a couple of questions. For the information of this jury, what is the distance in [277—242] Auburn yards from the track that the trains go out towards Seattle—it would be in this direction like this Narco Local leaving from the switch on the main track,—what is the distance from that point down to the lead where the engines take these trains out to go to Tacoma?

A. It is a fraction over two miles.

Q. A fraction over two miles?

A. Perhaps two miles and one-tenth or maybe two-tenths, not quite a quarter over two miles.

Q. What is the length of a log flat?

A. 41 feet is the length of a common Northern Pacific log flat.

Q. What is the length of an engine and tender on a train?

A. It depends on the different engines; this engine 1784 is probably 70 or 75 feet,—tender and engine.

Q. Say that each car is 41 feet and the tender and engine is 71 feet,—is there some distance between the cars? A. Yes, sir.

Q. How much, approximately?

(Testimony of J. J. McCullough.)

A. Less than three feet. Over two. Two and a fraction.

Q. In ordinary parlance, what number of cars of this character is considered as making a mile?

A. It is fair to presume 100 cars.

Q. A hundred cars would ordinarily represent a mile and 50 cars a half mile? A. Yes, sir.

Q. Look at this wheel report and tell this jury how many cars there were in this train going to Renton,—do you remember? [278—243]

A. 74 or 77.

Q. So that train would be approximately three-quarters of a mile long?

A. Yes it would be not much longer than that and nearly that long.

Q. Now, I did not want to make any statement to the jury that I do not prove. I don't want them to remember anything that I don't prove. The wheel report on this train gives the time that the trains leave. Where is that time given in, Superintendent McCullough? What does that represent?

A. The leaving time shown on the wheel report?

Q. Yes.

A. That should be put on by the conductor to correspond with his time slip and other reports.

Q. Where does he hand in that information? I mean where does he make that memorandum? Before he leaves the yard?

A. He shows that on his register. The official time that the train leaves the station.

Q. The time this conductor would leave Auburn,

(Testimony of J. J. McCullough.)

—would he have to go to a yard office, Superintendent McCullough? A. Yes, and register.

Q. I notice that the dispatcher had 9:50 and the conductor says 10:00.

A. That might be in this way. The train was called to leave at 10:00 and might have left five minutes earlier.

Q. Presumably the dispatcher's sheet would be the one that was correct? A. Yes. [279—244]

Q. So far as operation is concerned you would assume that the train left at 9:50, which the dispatcher has as the leaving time?

A. Absolutely. It is not necessary to have an actually correct record of time on the wheel report, although it is desirable.

Q. You had some of the official staff checking in Seattle and Auburn. You did not play any favorites as between Seattle and Auburn on inspection of cars, did you, Superintendent McCullough?

A. No, sir, the same attention was given to all out-bound trains,—trains going out.

Q. And the same in Tacoma? A. Yes, sir.

Cross-examination.

(By Mr. LIST.)

Q. Which one of the trains was it that went to Renton and which one to Ellensburg or up in that direction and which one to Tacoma?

A. I have forgotten the engine numbers. They are marked on the slips.

Q. No, I just want you to tell us where it was.

(Testimony of J. J. McCullough.)

A. Extra 1263, Conductor Lawrence, the report shows it leaving Auburn at 10:20 going to Tacoma.

Q. That is the only one that went to Tacoma?

A. The only one that we are interested in here.

Q. No. 1616 is the one that went east up towards Ellensburg? A. Yes, sir.

Q. And the one which went at 9:50 went to Renton? A. Yes, sir, No. 1784. [280—245]

Q. Have you a blue-print of the Auburn yard so you can show the jury where these trains left?

A. Not here.

Q. Are you able with the blackboard to sketch it off so the jury will understand and show where these trains left on this particular morning?

A. Yes, I believe I can from the information I have heard here. Not that I saw them, you understand, but from information I have heard. I think I can draw a pretty fair picture of it on a blackboard.

(Witness draws diagram on blackboard.)

(Witness excused.)

**Testimony of R. M. Crosby, for Defendant
(Recalled).**

R. M. Crosby, recalled as a witness on behalf of defendant, testified as follows:

Direct Examination.

(By Mr. WINDERS.)

Q. Mr. Crosby, you have testified that you have charge of equipment and that you are familiar with this car No. 67105,—log flat. A. Yes, sir.

(Testimony of R. M. Crosby.)

Q. Was that car when originally put into service equipped in accordance with Government standards? A. Yes, sir.

Cross-examination.

(By Mr. LIST.)

Q. Mr. Crosby, when you say equipped according to the standards [281—246] of the Government you mean that there was an end handhold on the face of the end sill on the end, do you?

A. Yes, sir, and all other standard equipment.

Q. That end sill is how wide?

A. The end sill?

Q. Yes.

A. Ordinarily six inches wide.

Q. You don't mean to say that that hand hold was down at the bottom of the end sill instead of being at the top of it almost flush with the deck of the car?

A. No, there are very few flat cars that you can apply grabirons in that location.

Q. In fact you have some of those flat cars where the grabiron has been applied up near the top?

A. Yes, there is an obstruction that makes it necessary to apply it nearer the top than the bottom.

Q. There isn't any uniform standard as to the exact spot on that end sill where you put that handhold?

A. We have a standard location, yes, sir.

Q. Is that always followed?

A. That is supposed to be followed.

(Testimony of R. M. Crosby.)

Q. Is it always followed?

A. Well, I would not,—so far as I know it is.

Q. You, of course, do not look after those things personally?

A. Well, I don't see every grab iron that is put on our cars.

Q. Now, if there was about a four to six-inch bunk, and the hand hold was applied almost flush with the deck, do you mean to say that under those circumstances that [282—247] a log would foul the handhold?

A. It would be very unusual.

Q. I want to ask you if you mean to say it would be impossible.

A. A log might have an elbow on pointing down.

Q. That would make it possible?

A. Yes, sir.

Redirect Examination.

(By Mr. WINDERS.)

Q. If it did have an elbow on and dropped down,—we will assume for the purpose of the argument that it dropped down in the handling of the logging car,—in your experience with logging cars might not that log shift back again in the next ten feet?

A. Yes, sir.

Q. In other words, if it did not have that kind of an elbow they are talking about, and the log had been down something like this so that it would

(Testimony of R. M. Crosby.)

come down too low, when that train or car is moved, it is just as probable that it would shift back again?

A. Yes, sir.

Q. So, if he went along and saw one of those things down there,—assuming that Mr. Weeks saw one down there,—if that train had been moved before the inspectors got along, it is just as probable that that log had shifted back into its proper position?

A. That is true.

Q. You had official records of Centralia, did you?

A. Yes, sir. [283—248]

Q. You knew what was going on?

A. Yes, sir.

Q. You knew the men that you were able to get?

A. I know we were having a great deal of difficulty to get any men to go to Centralia at that time by reason of the I. W. W. and other elements that seemed to infest that particular locality.

Q. What is the fact as to whether or not, if one of these boys, found, or if the conductor actually saw,—or his brakemen,—this elbow sticking down here on this car,—was there any available force or available means to unload that car at Centralia at that time?

A. Not at that time.

(Witness excused.)

Mr. WINDERS.—That is the defendant's case, your Honor. [284—249]

**Testimony of William E. Weeks, for Plaintiff
(Recalled in Rebuttal).**

WILLIAM E. WEEKS, produced as a witness on behalf of plaintiff, testified as follows in rebuttal:

Direct Examination.

(By Mr. LIST.)

Q. Mr. Weeks, will you just refer to that blackboard there briefly and clear up a little question as to where you were when those trains moved out?

Mr. WINDERS.—If your Honor please, he has already stated the tracks and numbers. This is not redirect examination. We went into that fully on direct examination and cross-examination.

(Argument.)

The COURT.—I can't tell as yet whether it is or not. Objection overruled.

Q. (Mr. LIST.) Go ahead, Mr. Weeks.

Mr. WINDERS.—I insist that questions be asked.

Mr. LIST.—I ask that Mr. Weeks explain his position when those trains moved out.

Mr. WINDERS.—He has already testified on that proposition.

The COURT.—I don't understand that he testified how he got from one train to another.

Mr. WINDERS.—Then it is not rebuttal.

The COURT.—Objection overruled.

A. This outbound track described here (indicating)—

Mr. WINDERS.—I submit that this witness should answer the question and not make a lecture.

(Testimony of William E. Weeks.)

Q. (Mr. LIST.) Just point out there about where you stood when the first train went out. Take the first train that went out at 9:50,—Train No. 930.

The COURT.—On redirect examination you have a right [285—250] to ask leading questions in order to narrow the issue and avoid getting into something that is not rebuttal testimony.

A. I don't remember at all of telling that I stood at any definite point.

Mr. WINDERS.—I move to strike the answer as not responsive.

The COURT.—It will be stricken.

Q. (Mr. LIST.) Just state now,—if you don't recall that you did,—just about where you did stand with respect to some fixed object there.

Mr. WINDERS.—Do you have to use your book?

The WITNESS.—I testify from my book.

Mr. WINDERS.—I say, you have to use your book?

The WITNESS.—Yes, sir, I make a record of this testimony. In stating the location, it is opposite or near the yard office. The yard office would be there (indicating), directly across here (indicating), there being nothing fixed, I have not any fixed object to locate myself.

Mr. WINDERS.—I move to strike the last part of the answer.

The COURT.—Motion denied. Just what is it that you propose to show by this witness that he did not testify to before?

(Testimony of William E. Weeks.)

Mr. LIST.—Simply that he could get out and see this train when it went out at 9:50,—that he could get from one train to the other and see these cars that he has testified about. [286—251]

The COURT.—Why don't he tell it?

Mr. LIST.—He is going to, but Mr. Winders interrupted and objected.

The WITNESS.—There is a viaduct that goes off up here some place (illustrating). The defects were nearer—

Mr. WINDERS.—I move to strike that answer.

Mr. LIST.—It is not a question of standing there to see the whole train going out. Mr. Weeks testified that he only stood there to see these defects in the train. Therefore when the last defect gets by him it is not necessary to stand there for the whole train to go by.

Mr. WINDERS.—I am not objecting to him stating where he stood.

The COURT.—He will have to make it intelligible. He will have to state where he stood in relation to the train. I will overrule the objection. He is telling about the viaduct in relation to the train. Objection overruled.

The WITNESS.—I was here at the yard office on Track 6 for the southbound. I was near the yard office on Track 6 for the southbound. One train was going one way and one the other. The northbound train was going out this way (indicating) and the southbound train would be leaving from Track 6 out that way (indicating).

(Testimony of William E. Weeks.)

Q. (Mr. LIST.) Were you in a position so you could get from one train to the other so you could see these cars that have been talked about as they passed by? [287—252]

Mr. WINDERS.—I object to that.

A. Yes, sir.

Mr. WINDERS.—I object to that question, because he has already testified that he did.

The COURT.—Objection sustained.

Q. (Mr. LIST.) Mr. Weeks, some question has been brought into this case by some of the witnesses,—particularly Mr. Alsip. He said these cars were not equipped with hand holds on the end of the flat cars so that they could come up to less than two inches from the top of the floor. I am going to ask you to state if you recently made any inspections of any flat cars for the purpose of seeing whether they were equipped with hand holds that come up to less than two inches from the top of the floor.

Mr. WINDERS.—I object to that as not rebuttal.

The COURT.—Objection sustained.

Mr. LIST.—Exception.

Q. (Mr. LIST.) I want to make it a little more definite. I am going to ask the witness one more question. Mr. Weeks, state whether or not yesterday morning you inspected a number of flat cars in the yards of the Northern Pacific for the purpose of ascertaining whether or not the hand holds on the ends were applied at the top so that they could be fouled by lumber or logs.

Mr. WINDERS.—I object to that on the ground that it is not redirect and can't be material. I am not caring in this case whether this grab iron was up this high or was not. [288—253]

The COURT.—Objection sustained.

Mr. LIST.—Exception.

(Witness excused.)

Mr. LIST.—That is all, your Honor.

(Argument to the jury.)

Whereupon the Court instructed the jury as follows: [289—254]

Instructions by the Court.

GENTLEMEN.—You have had the case explained to you. You will take out with you to the jury-room the pleadings in the case, consisting of the complaint of the plaintiff and the answer of the defendant and the reply of plaintiff to the answer. As you have been advised by counsel, the Court instructs you to return a verdict of not guilty on the eighteenth count, and I have written in the formal verdict that will be submitted to you the word “not” in the blank left in the verdict as to the eighteenth count. All of these counts charge the defendant with violations of the Safety Appliance Law. One provision of that law is to the effect that all cars shall be equipped with secure sill steps and an efficient hand brake. Now, one of the counts—the fourteenth count—alleges that the sill step on a certain car was broken. The provision of the statute is that it should be secure,—

that the cars should be provided with secure sill steps. Well, if a sill step was broken so that it was not secure, and it was used in violation of the provisions of the act, why, that would be, if it was shown by the evidence,—a preponderance of the evidence,—it would be your duty to return a verdict of guilty on that count.

The issues have been narrowed in the case somewhat. The complaint alleges that the defendant operates an interstate railway; that on certain dates it hauled certain cars out of Auburn and Centralia, on which cars there were certain defects. Now, the defendant by its answer admits that it is an interstate railroad; it admits that it hauled from Auburn these cars and hauled [290—255] from Centralia these cars mentioned. But it denies that it hauled these cars with defects of which complaint is made. That narrows somewhat the issues in the case.

The main issue you will find under each count is whether the car was moved over the line of the railroad,—moved out of the yard over the line of railroad,—with a defect existing of which complaint is made, with the subsidiary question of whether such a movement was necessary to get the car,—if it had a defect,—to get it to the nearest available repair point, and that whether it could not have been repaired at the point where it was,—that is, at Auburn or Centralia. Before you can find a verdict of guilty on any count of the complaint the plaintiff must have shown by a fair preponderance of the evidence those material allegations in the complaint,—that count of the com-

plaint,—which are put in issue by the answer of the defendant. Unless there is a fair preponderance of the evidence in plaintiff's favor on those disputed material allegations why, it would be your duty to return a verdict of not guilty.

Now, coming back again to this section,—I have nothing further to instruct you regarding the sill steps,—that same section provides that the car should be equipped with an efficient hand brake. Now, that word “efficient,”—it is difficult to find anything to define it further. It is doubtful whether it requires definition,—the word “efficient.” There has been something said to you in argument about an operating brake. Well, a brake that can be operated with difficulty is not an efficient hand brake, I instruct you, within the meaning of this [291—256] law. Probably as near a definition as you can get in the ordinary language of the street regarding an efficient hand brake would be one that was in first-class operating condition.

Under this section of the law there has been testimony regarding certain brake staffs,—hand brake staffs,—that were bent. Well, if the staff of the brake was bent and it impaired the operating condition of the brake, the brake would not be efficient; but if there was some such slight bend in the staff that did not interfere with the efficiency of the brake it would not be in violation of this law merely because the staff was bent slightly.

There are certain other counts in the complaint that are drawn regarding the automatic couplers. There is a section of this law that requires that the

car shall be equipped with automatic couplers coupling upon impact so as not to require a man to go between the cars in order to effect the coupling. Under certain counts they claim the levers were missing by which the car could be uncoupled. You understand the cars are required to couple upon impact; that is, when one car is bumped up against the other that they couple. As the Court understands the evidence, they have to be uncoupled with a lever worked from the side of the car in such fashion that the men handling the cars can use these levers without going between the ends of the cars. Of course, if these brake levers were missing so that they did have to go between the ends of the cars, that would be a violation of the Act. One count [292—257] avers that the uncoupling lever was disconnected from the lock block and another that the lock link of the coupler was broken. Well, if those defects existed and they were such that the defects necessitated the men going between the ends of the cars to uncouple them, that would be a violation of the Safety Appliance Act under those counts.

There is another section that provides,—or rather forbids,—the use of cars that are not provided with secure grabirons or handholds on the ends and sides of each car for greater security for coupling and uncoupling the cars. Now, under that provision there is a count that the handhold was bent against the car, not leaving the minimum clearance of two inches.

Count seven avers that the handhold was missing, and count eleven that the handhold was bent in not leaving two inches clearance. Count thirteen alleges that the handhold was fouled by the lading on the car. Count nine alleges that the handholds were missing from the sides of the car. Well, in those counts where it is averred that the handholds were missing, if they were missing, that would be a violation of the Act, if the car was run out of the yard on to the line, unless it was to the nearest available repair point. The Interstate Commerce Commission, supplementary to this Act, has provided for a minimum clearance of two inches on these handholds. And that is a definition,—one feature at least,—that it is necessary to make the handholds secure, and was within [293—258] the province of the Interstate Commerce Commission; and a violation of that regulation by the use of a car having handholds on it with less clearance than that would constitute a violation of the Act.

The tenth count relates to a ladder in which it is claimed that the tread was bent in, leaving a minimum clearance of less than two inches.

I have advised you that the burden of establishing by fair preponderance of the evidence that the particular defect of which complaint was made in the particular part of the complaint that you are considering rested upon the plaintiff before it could recover, and that the car was run out of the yard on to the main line with that defect. So far as the question concerning all those counts of the complaint where the defendant contends that the

car was moved for the purpose of repairing the defects at the nearest available repair point, if you find the defect to have existed and that the car was moved out of the yard on to the main line, the burden of showing by a fair preponderance of the evidence that the removal was necessary in order to have the car repaired, that it could not be repaired in the yard and it was being removed to the nearest available repair point,—the burden of establishing those matters by a fair preponderance of the evidence rests upon the defendant.

There has been considerable said in the evidence and in the argument regarding the effect of the strike. You are authorized to take what the evidence has shown regarding this strike into account in determining [294—259] whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective. You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops and machinery and tools to effect repairs, but it would be necessary to have men to operate those shops, tools,

equipment, and machinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great. There may be other things that you might consider the strike as bearing upon. A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused [295—260] it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways. That fact may enable you to harmonize to some extent the dispute in the evidence without finding it necessary to determine that one side or the other tried to deceive you.

I have been requested to give certain instructions in writing,—and will read some of them to you. (Reads.)

This is a civil, and not a criminal cause of action. The Government is only required to prove its case by a fair preponderance of the evidence.

By a fair preponderance of evidence is not

meant the greater number of witnesses, but means that character of evidence which to the jury seems the most convincing, the most satisfying.

If the jury believes, upon a fair preponderance of the evidence, that any car was hauled by the defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action, unless moved for the purpose of being repaired, as I have explained to you.

The Government inspectors are not required to notify the railroad company of defects found in its equipment. The work of maintaining its equipment in good, safe condition devolves upon the railroad, and if [296—261] any car was hauled in a defective condition, as alleged, it is no defense for the carrier to say that the Government had failed to notify it of such defects.

In order to promote the safety of employees and travelers, the law imposes upon a carrier the absolute duty of keeping its equipment in repair; and this duty cannot be ignored or evaded by the defendant by saying that it exercised a high degree of care.

It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case. Yet you may consider what the evidence has shown in that respect in determining the nearest available repair point.

The provisions of the Safety Appliance Act are of such nature that they cannot be ignored, or set aside, by a carrier on the grounds of inconvenience to the carrier of keeping its equipment in repair.

The uncoupling apparatus on each car must be operated on its own mechanism, and it is no defense to say that even if a car has a defective coupler it can be uncoupled from the adjoining car by means of the uncoupling lever on such adjoining car.

The hand brake on a car must be operated whenever a car is in use regardless of the fact that there might not be any occasion or necessity to use that particular hand brake before a car had reached a certain destination. Therefore, it is no defense to say that on any car in question there was no necessity to use a defective hand brake until a time after the logs on the [297—262] car had been unloaded, or until the car had reached some point after leaving Auburn or Centralia. Of course, as I have instructed you already, if it was moved for the purpose of repairing the defects and the defects could not be repaired at Centralia or Auburn, you have a right still to consider that matter.

In order to comply with the spirit of the law, the defendant cannot establish a division terminal and make up trains at such terminal, and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in

road service, in the condition complained of by the Government. Notice the words "in road service." They would have a right, if they could not be repaired there and it was necessary to move them in order to secure the repairs, to haul them to the nearest available repair point, because that would not be in road service.

As to each of the cars hauled from Auburn or Centralia, if found to be defective as alleged, the jury must return a verdict for the Government unless the defendant has shown: That such car had been properly equipped with the appliance described by the Act of Congress and the orders of the Interstate Commerce Commission; that the defective equipment became defective while being used by the defendant on its line of railroad; that the defendant, through its officers or agents had discovered the defects; that [298—263] the defendant was hauling the car to the nearest available point from Auburn or Centralia where the car could be repaired for the purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia.

The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, cannot be considered as an excuse for not repairing the defective equipment in question; provided you find it could have been repaired at Auburn or Centralia.

In a case of this character, the plaintiff, having alleged that the defendant is guilty of violating the

so-called Safety Appliance Act of the United States and the amendments thereto, it has, as I have or will instruct you, the burden of proof and it does not devolve upon the defendant to affirmatively prove the cars referred to in the several causes of action were in good repair in the particulars as alleged, but if the plaintiff has failed to establish, by a fair preponderance of the evidence as to any of the causes of action in its complaint that the car therein referred to was permitted to be hauled on the defendant's line in violation of the section of the Safety Appliance Act referred to in such cause of action, then your verdict as to such cause or causes of action will be for the defendant.

By its fourth cause of action the Government contends that the hand brake on the car therein described was fouled by the lading. The burden is upon [299—264] the plaintiff to show that this brake was fouled at the time of the movement of this car from the Auburn yards of the defendant.

In the causes of action numbered 1 and 11, the Government alleges the hand holds on the cars therein referred to were bent and when so bent were moved by the defendant as a common carrier in violation of the Safety Appliance Act. With reference to these two causes of action it devolves upon the Government to show by a preponderance of the evidence not only that the hand holds on these cars were bent and were so bent when the train moved from the Auburn yards, but the Government must also show that they were so bent as not to allow a

minimum clearance of two inches from the outside of the car.

Gentlemen, you don't want to confuse cause of action one and cause of action eleven with cause of action thirteen. In cause of action thirteen it is averred that the hand hold was fouled by the lading. In causes of action one and eleven the hand hold was alleged to have been so bent as not to leave a minimum clearance of two inches.

In cause of action thirteen if the hand hold was so near flush with the deck of the car that it was fouled by the logs, that would also be a violation.

By its thirteenth cause of action the Government has alleged a violation of the same Act that the hand hold on the car therein referred to was fouled by the lading, and the burden is likewise upon the Government to prove that the lading did so foul, cover up or interfere [300—265] with the hand hold on the car therein referred to, and that the car was moved out of the Centralia yards of the Northern Pacific in such condition.

By its tenth cause of action the Government alleges that the second tread from the top of the side ladder upon the "B" end of the car therein described was bent so as to allow a minimum clearance of less than two inches, and I instruct you that in passing upon this cause of action the burden is likewise upon the Government to show not only that the second tread from the top of the ladder on the coal car was bent and that it moved out of the Auburn yards of the defendant in such condition, but it must also show by a fair preponderance of

the evidence that at the time it did so move out of the Auburn yards.

By its eighth cause of action the Government has alleged that in the violation of the Act of Congress therein referred to, the defendant moved its own freight car from its Auburn yard with the hand brake wheel missing. The defendant admits that this particular freight car, being its own car No. 67105, was in defective condition and alleges that the same was being transported empty to Renton for the purpose of being placed in repair, and I instruct you that under the Act of Congress which is the foundation of the several causes of action in the plaintiff's complaint, it is provided that where railroad cars have become defective or insecure while such cars are being used by a carrier on its own line railroad that then such car after the discovery of such defect may be hauled from [301—266] the place where it was first discovered to be defective or insecure to the nearest available point where such car can be repaired; if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point, that this can be done without liability for the penalties imposed under the terms of such act. It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by "necessary" I do not mean that you must find that it was impossible to repair

this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by defendant for such purpose was not a violation of the law, and if you so find, your verdict should be for the defendant on this cause of action.

The Government must show by a preponderance of the evidence that the cars were defective in the particulars as pointed out in the several causes of action and at the time were actually being moved over a part of defendant's railroad used as a part of a [302—267] highway of interstate commerce, and unless the Government has so proven,—well, there is no dispute about it being a part of a highway used in interstate commerce.

If when said cars did actually move out of such yards and on the track referred to in the evidence the defects, if any, theretofore existing, had been remedied so as to comply with the Acts of Congress as pleaded and the regulations issued pursuant thereto, then it would be your duty to find upon such causes of action for the defendant; and if there is no preponderance of the evidence showing that they moved out on the line unrepaired, your verdict, as to such, should be for the defendant.

It is alleged, and it is an admitted fact, that the defendant is an interstate carrier of freight and passengers for hire and as such it was its duty, as a matter of law, during the period referred to in the several causes of action herein, to use every reasonable effort to perform its duties as a common carrier of freight and passengers. The defendant by its answer has alleged that at said period and without fault on its part, certain of its employees had left its service in protest against certain orders and directions made by the United States Labor Board, and that among such employees were its car inspectors and car repairers and that in order to perform its duty to the public, it was, pending its ability to obtain other employees, necessary that it use many of its other officers and employees for such purpose and that by reason of the circumstances and conditions surrounding the withdrawal [303—268] of such employees it did not have available the repair facilities that it would have otherwise had, but that it did make all repairs necessary to comply with the Act of Congress referred to and the regulations issued pursuant thereto as alleged in the several causes of action herein, and I instruct you that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving and in determining the disputed questions of fact in this case that you have a right to take into consideration the surrounding circumstances and conditions as they existed at the times alleged in the complaint herein in so far as the same have been established by the evidence. While the

fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you, and the evidence in connection therewith.

You can understand, gentlemen, that the fact that the defendant company is not permitted to take cars out of one repair point unrepaired on its line,—defective cars, unrepaired,—there is an implication and it is practically recognized in this suit, that the defendant or any other railroad so situated should inspect its cars before they left the terminal. Now, there is no provision, and it would be unreasonable to [304—269] require, that that inspection should be identical with the departure of the train. If the inspection is made within a reasonable time before the train leaves and the company—the defendant,—has no reason to apprehend that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, if mischievous individuals for any reason after that inspection inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, if it did not discover them until it was out on the line, unless the circumstances were such as to render them so glaring that they could not be overlooked in the exercise of that high degree of care to which

they are bound by the Act. After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired, then to take them to the nearest available repair point and remedy the defects.

You are in this case, as in every case where questions of fact are submitted to you, the sole and exclusive judges of every question of fact, of the weight of the evidence, and the credibility of the witnesses. In weighing the evidence and measuring the credit to be given to the different witnesses, you should take [305—270] into account their appearance, conduct and demeanor in giving their testimony, taking into account the reasonableness of their testimony in view of all the circumstances, whether it appears probable and likely, or whether it appears improbable. You are to take into account the situation in which they are placed as enabling them to know and see the things they claim to have seen; as one witness may have been more favorably situated as enabling him to see and know what had happened and what existed than another one who was just as anxious to tell you the truth. You are also to take into account whether the testimony of any witness has been corroborated where you would expect it to be corroborated if true, or whether it has been contradicted by other evidence in the case. On this

question of corroboration, you will remember, Mr. Winders argued to you that they were unable to corroborate in some respects their contention that these defects did not exist, because they were unable to keep the records that they would have kept but for the strike. If you would expect corroboration ordinarily from that quarter, you will take the want of corroboration into consideration along with the explanation that has been made, provided that explanation is supported by evidence. You will also take into account the interest that any witness may have been shown to have in the case, either as shown by the manner in which he gave his testimony or by his relation to the case, or anything that is shown by the evidence in relation to the feeling engendered by the strike. [306—271]

The COURT.—Is there anything further? If either side desires to take exceptions, now is the time to take them.

Mr. LIST.—If the Court please, the Government desires to except to that part,—the first part,—of the Court's charge wherein it is charged that the strike may be considered in connection with Auburn or Centralia ceasing to be a repair point.

Which part of said charge reads as follows:

There has been considerable said in the evidence and in the argument regarding the effect of the strike. You are authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the pur-

pose of making the repairs in the matters that are claimed to have been defective. You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops and machinery and tools to effect repairs, but it would be necessary to have men to operate those shops, tools, equipment, and machinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great.

Mr. LIST (continuing.) Second, I desire to except to that part of the Court's instructions wherein the jury were instructed that they may consider the sympathies of the men, as being indefinite and uncertain as to what [307—272] men were meant. It is uncertain whether the Court meant Government inspectors or the officials making these repairs or the outsiders or the men that went on the strike.

(Said part of said charge reads as follows:)

A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways.

This quoted portion of the charge was not read at the time of taking the exception but the portion of the charge referred to is the exception and afterward inserted in preparing the bill of exceptions.

The COURT.—I don't remember the connection in which that was used. What connection was that used in?

Mr. WINDERS.—I think your Honor used that in connection with telling the jury that we all know that when a strike takes place people become more or less excited, and one fellow might see a brake staff very much bent when under other conditions he would not notice it.

Mr. LIST.—I desire to take exception to that part of the Court's charge in which it is stated that the inspection may be within a reasonable time before the departure of the train, and that if mischievous individuals make an appliance defective, the company would not be liable if the company did not discover the defect until after the train got on the line. I desire further to except to that part of the Court's charge wherein the Court charged that a

train is to be considered as being on the line after a reasonable [308—273] time following the inspection.

Said part of said charge reads as follows:

After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired, then to take them to the nearest available repair point and remedy the defects.

Mr. LIST (continuing.) I also desire to except to the refusal of the Court to instruct as requested by the plaintiff in its request No. 1 as to each of the eighteen causes of action, and also except to the action of the Court in directing a verdict for the defendant on the eighteenth cause of action.

The COURT.—Exceptions allowed.

Mr. LIST.—I also desire to except to the refusal of the Court to give the following numbered requests made by the plaintiff,—that is a separate exception as to each one; No. 2, No. 5, No. 8, No. 9, No. 10, No. 12, No. 13, No. 14 and No. 15.

(Said requests herein referred to read as follows:)

1. The plaintiff requests the Court to direct a verdict in its favor on each of the eighteen causes of action, this motion to apply separately as to each cause of action.

2. In the event that Request No. 1 is refused as to any cause of action, plaintiff requests the Court to instruct the jury as follows with respect to such cause of action.

3. If the jury believes, from a fair preponderance of the evidence, that any car was hauled from Auburn [309—274] or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

8. It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case.

9. The provisions of the safety appliance acts are of such a nature that they cannot be ignored, or set aside, by a carrier on the ground that a strike has interfered with its operations. But the safety of other employees, those who operate trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

10. The uncoupling apparatus on each car must be operative of its own mechanism, and it is no defense to say that even if a car has a defective coupler it can be uncoupled from the adjoining car by means of the uncoupling lever on such adjoining car.

12. In order to comply with the spirit of the law, the defendant cannot establish a division terminal and make up trains at such terminal, and haul in such trains, cars with defective safety appliances,

such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government.

13. As to each of the cars hauled from Auburn or Centralia the jury must return a verdict for the Government unless the defendant has shown:

1st. That such car had been properly equipped with the appliance prescribed by the Act of Congress and the orders of the Interstate Commerce Commission.

2d. That the defective equipment became defective while being used by the defendant on its line of railroad.

3d. That the defendant, through its officers or agents, had discovered the defects.

4th. That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia. [310—275]

5. That such car was actually repaired at the nearest available point from Auburn or Centralia.

14. The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars cannot be assembled together in a train, and hauled from a terminal, some for repair and some in commercial ser-

vice. And the burden is on the defendant to show that this was not done.

15. The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, cannot be considered as an excuse for not repairing the defective equipment in question.

The COURT.—Exceptions allowed.

Mr. LIST.—I desire also to except to the Court's granting the following requests for instructions which were made by the defendant: Request for instruction No. 8.

The COURT.—I don't think I granted any of them as they were made exactly.

Mr. LIST.—Well, substantially as made. I assume that any changes that were made will show on the request. I think your Honor followed the request so that we can identify it by the number. In addition to excepting to Request No. 8 of the defendant, which I have already referred to, I except to the giving by the court of requested instruction No. 10 and No. 11. (Said requests as given read as follows:)

8. By its eighth cause of action the Government has alleged that in the violation of the Act of Congress therein referred to, the defendant moved its own freight car from its Auburn yard with the hand brake wheel missing. The defendant admits [311—276] that this particular freight car, being its own car No. 67105, was in a defective condition and alleges that the same was being transported empty to Renton for the purpose of being placed in repair, and I instruct you that under the

Act of Congress which is the foundation of the several causes of action in the plaintiff's complaint, it is provided that where railroad cars have become defective or insecure while such cars are being used by a carrier on its own line railroad that then such car after the discovery of such defect may be hauled from the place where it was first discovered to be defective or insecure to the nearest available point where such car can be repaired; if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point, that this can be done without liability for the penalties imposed under the terms of such act. It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by "necessary" I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by the defendant for such purpose was not a violation of the law, and if you so find, your verdict should be for the defendant on this cause of action.

11. It is alleged, and it is an admitted fact, that the defendant is an interstate carrier of freight and passengers for hire and as such it was its duty, as a matter of law, during the period referred to in the several causes of action herein, to use every reasonable effort to perform its duties as a common carrier of freight and passengers. The defendant by its answer has alleged that at said period and without fault on its part, certain of its employees had left its service in protest against certain orders and directions made by the United States Labor Board, and that among such employees were its car inspectors and car repairers and that in order to perform its duty to the public, it was, pending its ability to obtain other employees, necessary that it use many of its other officers and employees for such purpose and that by reason of the circumstances and conditions surrounding the withdrawal of such employees it did not have [312—277] available the repair facilities that it would have otherwise had, but that it did make all repairs necessary to comply with the Act of Congress referred to and the regulations issued pursuant thereto as alleged in the several causes of action herein, and I instruct you that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving and in determining the disputed questions of fact in this case that you have a right to take into consideration the surrounding circumstances and conditions as they existed at the times alleged in the complaint herein in so far as the same have been established by the evidence. While the fact of such

withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you, and the evidence in connection therewith.

The COURT.—I instruct the jury that any comments that the Court made on the evidence or facts in the case,—that as to those,—while the Court is authorized to comment on the evidence,—you are advised and the Court instructs you that you yourself are the sole and exclusive judges of every question of fact in the case, as I told you in my last instruction. You will yield only such weight to remarks of the Court as touching the evidence as you would consider its worth as a matter of argument as you might hear it from counsel, but not be controlled by it; where your judgment on matters of evidence differs from that of counsel or of Court, it is your duty to follow your own judgment.

Any further exceptions?

Mr. WINDERS.—I have no exceptions, your Honor. [313—278]

The COURT.—Is a sealed verdict agreed to?

(Both sides agreed to a sealed verdict.)

The COURT.—There are seventeen blanks left for you to fill in by writing in the word “is” or “not.” If you find for the plaintiff, you will write in the word “is,” making it read “Is guilty.” If you find for the defendant, you will write in the word “not,” making it read “not guilty.”

Mr. WINDERS.—I would like to say that if the jury does return a verdict, it is not necessary to call me up or to poll the jury.

IT IS HEREBY STIPULATED AND AGREED by the parties in the above-numbered and styled cause that the foregoing bill of exceptions contains all the evidence offered and received at the trial of said cause, and all proceedings at the trial thereof, together with the rulings of the Court and its instructions to the jury, and that said bill of exceptions may be settled, allowed and filed.

THOS. P. REVELLE,
United States Attorney.

C. E. HUGHES,
Assistant United States Attorney.

M. C. LIST,
Special Assistant to the United States Attorney.

O. K.—C. H. WINDERS,
Atty. Defdt. N. P. Ry.

Pursuant to the foregoing stipulation, this bill of exceptions is hereby approved, allowed, and the same is ordered filed.

July 17, 1923.

EDWARD E. CUSHMAN,
District Judge. [314—279]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [315]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE NORTHERN PACIFIC RAILWAY COM-
PANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant Northern Pacific Railway Company not guilty, as charged in Count I of the complaint herein; and further find said defendant not guilty, as charged in Count II of the complaint herein; and further find said defendant not guilty, as charged in Count III of the complaint herein; and further find the said defendant not guilty, as charged in Count IV of the complaint herein; and further find the said defendant not guilty, as charged in Count V of the complaint herein; and further find the said defendant not guilty, as charged in Count VI of the complaint herein; and further find the said defendant not guilty, as charged in Count VII of the complaint herein; and further find the said defendant not guilty, as charged in Count VIII of the complaint herein; and further find the said defendant not guilty, as charged in Count IX of the complaint herein; and

further find said defendant not guilty, as charged in Count X of the complaint herein; and further find said defendant not guilty, as charged in Count XI of the complaint herein; and further [316] find said defendant not guilty, as charged in Count XII of the complaint herein; and further find said defendant not guilty, as charged in Count XIII of the complaint herein; and further find said defendant not guilty, as charged in Count XIV of the complaint herein; and further find said defendant not guilty, as charged in Count XV of the complaint herein; and further find said defendant not guilty, as charged in Count XVI of the complaint herein; and further find said defendant not guilty, as charged in Count XVII of the complaint herein; and further find said defendant not guilty, as charged in Count XVIII of the complaint herein.

J. R. PIDDUCK,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 21, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [317]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Judgment.

BE IT REMEMBERED this cause came on duly and regularly for trial on the 19th day of June, 1923, upon the complaint of the plaintiff, the answer thereto of the defendant, and the reply to the affirmative matter in such answer on the part of the plaintiff; plaintiff appearing by C. E. Hughes, Assistant United States District Attorney, and M. C. List, Assistant Attorney General of the United States, and the defendant appearing by its attorney, C. H. Winders, and a jury having been duly and regularly empaneled to try said cause, and the plaintiff having introduced its evidence in support of the eighteen causes of action set forth in its complaint, and the defendant having introduced its evidence and rested, plaintiff having introduced its evidence in rebuttal, and both parties having rested, the cause was thereafter, under appropriate instructions as to the law, submitted to the jury for its determination and decision and the jury there-

after on the 21st day of June, 1923, having returned into court with its verdict wherein they found the defendant not guilty on each of the eighteen causes of action set forth in the plaintiff's complaint, said verdict being regular in form, it was regularly received and filed herein. [318]

NOW THEN, upon motion of the defendant for a judgment in its favor upon each of the eighteen causes of action set forth in the plaintiff's complaint, upon such verdict,

IT IS NOW by the Court ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing by reason of its complaint herein and the eighteen causes of action therein set forth, and that the defendant go hence without day as to the plaintiff's complaint and as to each of the eighteen causes of action therein set forth, and that this action, and each cause of action therein set forth, be and it is hereby dismissed.

To all of which the plaintiff excepts and its exception is allowed.

DONE IN OPEN COURT this 26th day of June, 1923.

EDWARD E. CUSHMAN,
Judge.

Received a copy of the within judgment this 25 day of June, 1923.

THOS. P. REVELLE,
U. S. Atty.,
Attorney for Plaintiff.
F. T. S.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 26, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [319]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a Corporation,

Defendant.

Plaintiff's Assignments of Error.

Comes now the United States of America, plaintiff herein, and files the following assignments of error, upon which it will rely in its prosecution of the writ of error in the above-entitled cause:

(1) The Court erred in overruling plaintiff's demurrer to the affirmative defense set forth in defendant's answer.

(2) The Court erred in overruling plaintiff's motion to strike from the defendant's answer the affirmative defense therein set forth.

(3) The Court erred in overruling plaintiff's objection to the following question asked of the witness Winter by counsel for the defendant and the answer thereto:

Q. Did you ever say anything to Mr. Burnham or any of the other gentlemen there,—Mr. Burnham or Mr. Crawford or Mr. Allmain,—this gentleman here,—or Mr. Alsip back here, at Centralia, about the cars you are complaining about in this case?

A. No, sir.

(4) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff:

Q. State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment? [320]

(5) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff:

Q. It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

(6) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff:

Q. Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed out defects to you upon which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the

Northern Pacific did not accuse you of being too fair to the Northern Pacific?

(7) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto:

Q. I mean just what I said. Was the company laboring any burden at that time in the Centralia yard? Any unusual burden?

Q. Was there a strike on in the Centralia yard?

Q. Was there a strike on? A. Yes, sir.

(8) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto:

Q. Isn't it a fact that your attention was called to the fact that in the Centralia yard, the Auburn yard, and other yards of the Northern Pacific, after a train was made up and defects were repaired, either the strikers or sympathizers with the strikers would come along, cut the air hose, and knock off grabirons— [321]

Q. You have testified that you had learned that there was a strike down at Centralia. I will ask you if your attention was not called, both at Centralia and Auburn,—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane, that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle docks, and

otherwise attempted to render the equipment defective. A. I have been told that.

(9) The Court erred in overruling plaintiff's objection to the following question asked of the witness Weeks by counsel for defendant and the answer thereto:

Q. Is it your opinion, Mr. Weeks, knowing the conditions you did know at that time, that it would have been reasonably safe for any man,—official or new employees of the Northern Pacific,—to go out on that transfer between the street-car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this drawbar?

A. It would have been as safe there as any other place on the road, in my opinion.

(10) The Court erred in refusing to allow the plaintiff to prove by the witness Winter that prior to the time involved in this case he had frequently made reports to the Interstate Commerce Commission of the Northern Pacific flat cars being so loaded with logs as to foul the end hand hold; that at the time of making such reports the Car Foreman and Inspector of Equipment of the defendant also took the numbers of such cars in his presence.

(11) The Court erred in refusing to allow the plaintiff to prove by the witness Winter that on the morning of June 20, 1923, in company with Mr. Pitts, another inspector of the Interstate Commerce Commission, and a Mr. Hazen, defendant's Chief Car Inspector at Auburn, they made an inspection of a number of flat cars similar to the one

involved in this case, and that the bunks on same were only four inches in height. [322]

(12) The Court erred in refusing to allow plaintiff to prove by the witness Winter, that at the same time and place and in company with the same persons mentioned in Assignment of Error No. 11 they found a car similar to the one involved in this case, loaded with logs; that there was just practically three inches clearance between the logs and the handhold, and that if the logs shifted as much as one inch, the logs on that car would have completely fouled the handhold on the end of the car, and that this fact was so admitted by defendant's Chief Car Inspector.

(13) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto:

Q. I wish you would state to the jury briefly and clearly so they can hear you the conditions confronting the operations of the Northern Pacific so far as inspectors and car repairs were concerned, from the 1st of July up to the 2d of September, with particular reference to Auburn and Centralia.

A. On the first of July, as practically everyone knows, and of course railroad men better than anyone else, the railroad employees right down to the wipers went out,—I think in Seattle a few wipers remained. So far as the car repairers and machinists and everything of that kind is concerned they walked off the job. We had instructions not to hire any outside men, and as a result of that it

devolved on the officers and men,—the few who remained,—of course the foreman,—car foreman,—in practically all cases remained to work. They did at Auburn and at points where Mr. Winter has mentioned. Besides the foreman, the work was largely done by other officers of the railroad. That condition continued up until July 18, when we started to hire a few men,—the best, of course, that we could secure. But, as you all know, the men that we could hire under those conditions, were not like the men that ordinarily do that work. However, we did get some good men after a while. We struggled along and did the best we could with what we had to do it with. The men worked long hours. The men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; couldn't work [323] any more than that. We worked along in that way. Now, I have heard some matters brought out here in connection with the inspection of trains that really seemed inconsistent to me, in that the cars were not inspected in the way that they were ordinarily inspected when we have the regular organized force of inspectors. That was true. We did not have the men to do it. The cars were assembled in the train, and they were inspected by these officers that I have mentioned. Sometimes prior to the train moving away,—as has been brought out here,—the hose were either severed,—generally I will say they were stabbed with a knife blade, not cut in two,—just a knife blade inserted,—and in one case we had 22 hose cut before we got out of Auburn. In other instances we had

to go around,—the hose were filled with waste,—both the air hose and the steam hose. The refrigerator-cars here in Seattle we had to set them on the steam track and connect them up with steam so as to keep those men from filling them up with waste, and other foreign substances. Taking the whole matter, it was a question of endurance so far as the Company was concerned. Everybody was working the constitutional limit. Every nerve was strained. There is no question about that. I don't know of anything that could have been done that was not done with the force available.

(14) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto:

Q. On the 31st of August, the evidence will show, on train leaving Auburn as was testified at 9:50,—as a matter of fact it registered out at ten,—he had on that twenty log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we at that time on the 31st of August have men available to put them in condition at Auburn?

A. I would say no. We did have men, but not sufficient.

(15) The Court erred in overruling plaintiff's objections to the following questions asked of the witness Crosby by counsel for defendant and the replies thereto:

Q. Now, Mr. Crosby, when was it that the Northern Pacific,—or was there any particular reason

why the Northern Pacific did not start to hire any men until about the 18th of August,—18th of July, I should say? [324]

A. Our purpose for not employing men was by reason of our having the hope, or an impression that the men would come to their senses and return to work. Our men who left the service did not do so because of any dissatisfaction that they had with the Northern Pacific. That is, they all gave me to understand that. I am pretty close to the working men.

Q. Was there any of these men went back East at that time, Mr. Crosby, or not?

A. The chairman of the different crafts. I don't know just how many of them went either to Chicago or Washington for the express purpose of making a separate agreement in so far as the Northern Pacific was concerned, and were refused by Mr. Jewell. I was looking up some letters on that. I did not have time before I left the office. We have it on record.

Q. It was not until after those men returned that you tried to hire outsiders?

A. I can't remember the date that they went down; I would not want to testify on that. I don't believe that we did.

(16) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the reply thereto:

Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials

of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue, having the standpoint of the safety of the men and the safety of the equipment and the property in mind?

A. No, I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself.

(17) The Court erred in overruling plaintiff's objection to the following question asked of the witness McCullough by counsel for defendant and the answer thereto:

Q. On July 1st what were you doing?

A. On July 1st at 10:00 A. M. I was waiting to see what would happen. At 10:00 o'clock it did [325] happen. Everybody quit,—all the car repairers, inspectors taking care of the equipment at Seattle, Tacoma, and at Portland. I believe about two old men stayed to work at Tacoma. I believe one at Seattle. Then we made the necessary arrangements, we called in volunteers. We had them already consolidated. We got in touch with them and kept our King Street station working and getting our passenger trains out of town. That is the first thing that we did that afternoon. The next morning I got over into Auburn and Kent. I found the situation over in Auburn,—I went out there July 1st and I found the car foreman, and the bridge inspector, the only two men working in the yards inspecting trains.

(18) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto:

Q. You were familiar with the conditions in Seattle and Auburn up to the 31st of August, were you, Mr. McCullough? A. Yes, sir.

Q. When was it that the company first started to employ new men?

A. We were directed to not do it, and I think that ban was lifted on either July 18th or 21st. I am not positive. I believe it was July 18th.

Q. Just tell the jury now up to August 31st what the conditions incident to and surrounding the operation of the Auburn yards were with reference to the inspection of trains and the making of repairs at that point, and in what way it was different from normal?

A. Under normal conditions and prior to July 1st, and at the present time there are four regular car inspectors working eight-hour shifts, and two or three other men doing light repairing and oiling and so forth. Probably somewhere between 20 and 25 men employed at Auburn inspecting cars and making light repairs and taking care of oiling boxes.

Q. When with reference to the cars being put on the train are these repairs made? A. Normally?

Q. Prior to the strike. And now. [326]

A. Most all the repairs were made on the repair track except small defects which inspectors would find.

Q. You are talking about during the strike period?

A. No, now.

(19) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto:

Q. During this same period up to August 31st, what is the fact as to whether or not these train crews were keeping a pretty close eye on the equipment?

A. That was a fact that was well known and not disguised. They frequently used to tell me about it and try to run a bluff on me about having a large number of cars leaving in a defective condition. I asked them to give me the car numbers, and told them if they found any cars defective I would be very glad to have them show me. I told that to the chairman of the Brotherhood Committee.

Q. Would they sometimes hold up the trains?

A. Once in a while they would falter around there about something.

Q. Were they particular about refusing to take the train out if there were any defects?

A. Oh, yes. Not all of them. Certain men. We would be particularly careful to see that everything was fixed. They would still be trying to find fault.

Q. These questions that I am asking you are general questions. You did not see those particular cars yourself, did you?

A. You mean that the suit was brought on?

Q. Yes, sir.

A. No, sir. I might have seen them at other dates. [327]

(20) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough with respect to car No. 67105 and the answer thereto:

Q. That is the eighth cause of action. What was the condition of that car when it left Auburn?

Q. Why was it going to Renton?

A. For general repairs, together with twenty-three or twenty-four others just like it.

(21) The Court erred in overruling plaintiff's objection to the following question asked of the witness McCullough by counsel for defendant and the answer thereto:

Q. What efforts had you used toward getting men at Auburn for the purpose of keeping equipment in repair and keeping commerce passing through there moving?

A. After we were authorized to employ men, almost everything was done to secure them; through advertising, men personally sent to different places, —I think we sent one man to Los Angeles or San Francisco,—I don't know which,—men were shipped in from all parts of the country. We had an office open in the Arcade Building in Seattle. Every newspaper carried one or more advertisements. We would hire any man,—didn't care what he was,—to go out and get some of the work done.

(22) The Court erred in overruling plaintiff's objection to the following questions asked of the

witness McCullough by counsel for defendant and the answers thereto:

Q. Supt. McCullough, being familiar with the situation that existed in Seattle on the 31st day of August,—or rather on the 7th day of September,—would you say that it would be reasonable to have attempted to make repairs of any character upon that transfer track located, as it was, in the public street and not on the property of the company, and between the street-car track and the paved portion of Whatcom Avenue?

A. It would be very unsafe, unless the men doing the work were heavily guarded. [328]

Q. Would it, in your opinion, knowing the situation and the obligations of the company to the city and the officials of the city and the government,—would it have been countenanced by anyone exposing the men out there at that time for the making of repairs?

A. My impression is it would not?

Q. As a matter of fact, at that time the United States was trying to furnish protection, was it not?

A. Yes, sir, and we refrained from putting even inspectors out there. It was one of the last things that we would have done, because we did not want to put them there. We were afraid.

(23) The Court erred in overruling plaintiff's objection to the following question asked of the witness Crawford by counsel for defendant and the answer thereto:

Q. What was the situation out there around about the first of September? Just tell the jury

with reference to the work and with reference to the trains going out, and the conduct of the conductors,—of some of the conductors,—and brakemen in taking out their train. You were there. Tell them.

A. In the first place we were doing a very large volume of business. The Auburn terminal was as busy then as probably it ever was or ever may be again. The attitude of the trainmen was most critical. I mean by that that they departed from their regular path of duty to inspect and examine. I have seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily, and would refuse to do if they were told to do it ordinarily. So that, in addition to our inspection, which was close, we had the assistance in that way of the conductor and his three brakemen. And, as I say, they were most particular to find a defect. It was not always a defect which amounted to anything, but if it was anything they could kick about, they took the occasion to do so, and we either repaired the car without dispute or carded it "bad order" and had it sent out of the train. The inspection force consisted almost entirely of the officers of the company, and there was some interference from outsiders,—a great deal of interference from people who were apparently our employees,—in connection with the operation of the air brakes on the train and other matters pertaining to the cars. [329]

(24) The Court erred in overruling plaintiff's objection to the following questions asked of the

witness Burnham by counsel for defendant and the answers thereto:

Q. What was the attitude along about the 31st of August of the train crews with reference to taking out trains? Was it critical or otherwise?

A. They were very critical. As a matter of fact, the train crews generally did as much inspecting as we did. The intention was to delay the movement of trains as much as possible. That was the impression we gained,—the only impression that we could gain after what we saw they were doing.

Q. At that time were your trains being held up by these crews claiming something was wrong?

A. Yes, sir.

Q. Was that a common occurrence?

A. That was a common occurrence on train 930.

Q. That is this train that went out to Narco?

A. Yes, sir.

Q. Just tell the jury about what conditions were around there at that time, Mr. Burnham?

A. The other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen. That is, they tried to make it appear that the inspection which was being made by the men that were there was not effective, and they even went so far as to cut the hose after we had,—I will have to explain that first before I get into that. The first thing we did, we asked the engineer to apply the air. Then we went along the train and made an inspection of the hose to see if there was any leaky hose or anything else that might appear. Then we asked the engineer to release the air. We would find in some cases that

after the air had been applied angle cocks had been turned, or sometimes if we happened to be in the center of the train,—a train of 75 cars,—some way or other the angle cocks at the rear of the train were opened up so the brakes were not effective. As a matter of fact, they hindered us in every way possible.

(25) The Court erred in overruling plaintiff's objection to the following question asked of the witness Alsip by counsel for defendant and the answer thereto: [330]

Q. What were the conditions on that date,—that is the surrounding conditions, as to—well, as to your safety at night, and what was being done to your equipment after you had it examined and attempted to repair it?

A. I think probably we had as much interference at Centralia as any other one place in the Northwest territory. First of all, Centralia is a notorious place, as you know. We were continually interfered with in making up our trains and inspecting our trains and connecting the air. Even after we had passed one of our trains and given the engineer the signal to set the air and release the air we have found and been notified in some cases of malicious acts on the part of unknown persons which resulted in defects such as we are talking about now,—cutting levers disconnected, air hose out or pulled apart, and in some instances the stirrups were bent off by the use of bars, same as we would use in straightening, and opening the angle cock to prevent our getting a full air pressure. And numerous other things

such as Mr. Crosby spoke of,—waste being placed in the house,—and the gaskets taken out,—and numerous other things.

(26) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Alsip by counsel for defendant and the answers thereto:

Q. I don't know whether I asked you or not, but how were you being treated along this time when things got very critical about the 2d of September by the train crews when taking out their trains? Were they particular about the condition of their equipment when it went out of Centralia?

A. They were giving the trains as good an inspection as we could possibly give them, and they had instructions from their various officers,—their organizations—to take records and report any cars that were not in shape and also to refuse to take them. In many cases they would delay the trains. I have seen trains in Centralia delayed as high as one hour waiting for some of us to come and make some minor repair or to have a car set out, and in some instances I have had to use this particular crew that was objecting to the condition of the car to make a set-out of the car, because the switch engines were not available. The situation,—the condition was very critical, especially at Centralia. That is borne out by not only the records but the news items during that time that we were not able to get help at Centralia, largely for the reason that Centralia had a notorious reputation as an I. W. W. center. While a great many other points were supplied [331] with help, we could not get men to go

to Centralia. When we did, we only dared to put them to work in the day time. That left Mr. Nixon and myself to work in the nights continuously. In fact, I was not released at Centralia until October 12th. I was continually in service from July 1st to October 12th. Only by the aid of my automobile we were able to keep up with the game.

Q. You knew the men that you were able to get?

A. I know we were having a great deal of difficulty to get any men to go to Centralia at that time by reason of the I. W. W. and other elements that seemed to infest that particular locality.

(27) The Court erred in refusing to allow the witness Weeks to answer the following questions asked by counsel for plaintiff:

Q. Mr. Weeks, some question has been brought into this case by some of the witnesses,—particularly Mr. Alsip. He said these cars were not equipped with hand holds on the end of the flat cars so that they could come up to less than two inches from the top of the floor. I am going to ask you to state if you recently made any inspections of any flat cars for the purpose of seeing whether they were equipped with hand holds that come up to less than two inches from the top of the floor.

Q. I want to make it a little more definite. I am going to ask the witness one more question. Mr. Weeks state whether or not yesterday morning you inspected a number of flat cars in the yards of the Northern Pacific for the purpose of

ascertaining whether or not the hand holds on the ends were applied at the top so that they could be fouled by lumber or logs.

(28) The Court erred in that part of its charge to the jury, wherein it said:

There has been considerable said in the evidence and in the argument regarding the effect of the strike. You are authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective. You can readily comprehend that in establishing a [332] railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops and machinery and tools to effect repairs, but it would be necessary to have men to operate those shops, tools, equipment, and machinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased

to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great.

(29) The Court erred in that part of its charge to the jury wherein it said:

A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways.

(30) The Court erred in that part of its charge to the jury wherein it said:

If the inspection is made within a reasonable time before the train leaves and the company,—the defendant,—has no reasonable apprehension that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, if mischievous individuals for any reason after that inspection inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, if it did not discover them until it was out on the line, unless the circumstances were such as to render them so glaring that they could not be overlooked in the exercise of that

high degree of care to which they are bound by the Act.

(31) The Court erred in that part of its charge to the jury wherein it said:

After the inspection, it *it* is made a reasonable time before the departure of the train, the train [333] should be considered as upon the line, and and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired, then to take them to the nearest available repair point and remedy the defects.

(32) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighth cause of action, same being included in plaintiff's request for Instruction No. 1:

The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(33) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighteenth cause of action, the same being included in plaintiff's request for Instruction No. 1:

The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(34) The Court erred in refusing to submit the eighteenth cause of action to the jury, as requested by the plaintiff by its request for Instruction No. 2:

In the event that Request No. 1 is refused as to any cause of action, Plaintiff requests the Court to instruct the jury as follows with respect to such cause of action:

(35) The Court erred in directing a verdict for the defendant on the 18th cause of action and entering a judgment thereon. [334]

(36) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 5:

If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

(37) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 8:

It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case.

(38) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 9:

The provisions of the safety appliance acts are of such nature that they cannot be ignored, or set

aside, by a carrier on the ground that a strike has interfered with its operations. But the safety of other employees, those who operate trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

(39) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 12:

In order to comply with the spirit of the law, the defendant can not establish a division terminal and make up trains at such terminal and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government. [335]

(40) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 13:

As to each of the cars hauled from Auburn or Centralia the jury must return a verdict for the Government unless the defendant has shown:

1st. That such car had been properly equipped with the appliance prescribed by the Act of Congress and the Orders of the Interstate Commerce Commission.

2d. That the defective equipment became defective while being used by the defendant on its line of railroad.

3d. That the defendant, through its officers or agents, had discovered the defects.

4th. That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia.

5th. That such car was actually repaired at the nearest available point from Auburn or Centralia.

(41) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 14:

The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars can not be assembled together in a train, and hauled from a terminal, some for repair and some in commercial service. And the burden is on the defendant to show that this was not done.

(42) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 15:

The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or [336] Centralia, cannot be considered as an excuse for not repairing the defective equipment in question.

(43) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 8.

By its eighth cause of action the Government has alleged that in the violation of the Act of Congress therein referred to, the defendant moved its own freight car from its Auburn yard with the hand brake wheel missing. The defendant admits that this particular freight car, being its own car No. 67105 was in a defective condition and alleges that the same was being transported empty to Benton for the purpose of being placed in repair, and I instruct you that under the Act of Congress which is the foundation of the several causes of action in the plaintiff's complaint, it is provided that where railroad cars have become defective or insecure while such cars are being used by a carrier on its own line railroad that then such car after the discovery of such defect may be hauled from the place where it was first discovered to be defective or insecure to the nearest available point where such car can be repaired; if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point, that this can be done without liability for the penalties imposed under the terms of such act. It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by "necessary" I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only

practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by the defendant for such purpose was not a violation of the law, and if you so find, your verdict should be for the defendant on this cause of action.

(44) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 11. [337]

It is alleged, and it is an admitted fact, that the defendant is an interstate carrier of freight and passengers for hire and as such it was its duty, as a matter of law, during the period referred to in the several causes of action herein, to use every reasonable effort to perform its duties as a common carrier of freight and passengers. The defendant by its answer has alleged that at said period and without fault on its part, certain of its employees had left its service in protest against certain orders and directions made by the United States Labor Board, and that among such employees were its car inspectors and car repairers and that in order to perform its duty to the public, it was, pending its ability to obtain other employees, necessary that it use many of its other officers and employees for such purpose and that by reason of the circumstances and conditions

surrounding the withdrawal of such employees it did not have available the repair facilities that it would have otherwise had, but that it did make all repairs necessary to comply with the Act of Congress referred to and the regulations issued pursuant thereto as alleged in the several causes of action herein, and I instruct you that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving and in determining the disputed questions of fact in this case that you have a right to take into consideration the surrounding circumstances and conditions as they existed at the times alleged in the complaint herein in so far as the same have been established by the evidence. While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you, and the evidence in connection therewith.

THOS. P. REVELLE,

United States Attorney.

C. E. HUGHES,

Assistant United States Attorney.

M. C. LIST,

Special Assistant to the United States Attorney.

Due and personal service of the within assignments of error admitted at Seattle, Washington, this 10th day of July, 1923.

GEO. T. REID,
C. H. WINDERS and
L. B. daPONTE,
Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 11, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [339]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

**Stipulation Extending Time to and Including July
25, 1923, to File Bill of Exceptions.**

IT IS HEREBY STIPULATED by and between the parties hereto that the plaintiff may have and take up to and including the twenty-fifth day of July, 1923, in which to present and file for allowance herein its proposed bill of exceptions in the above-entitled cause.

Done in open court this 27th day of June, 1923.

THOS. P. REVELLE,

United States District Attorney.

C. E. HUGHES,

Assistant United States District Attorney,

Attorneys for Plaintiff.

C. H. WINDERS,

Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [340]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,

Defendant.

**Order Extending Time to and Including July 25,
1923, to File Bill of Exceptions.**

Upon stipulation it is

ORDERED that the above named plaintiff may have and take to the twenty-fifth day of July, 1923, in which to serve and file for allowance herein its proposed bill of exceptions in the above-entitled cause.

Done in open court this 28th day of June, 1923.

EDWARD E. CUSHMAN,
United States Judge.

Approved: THOS. P. REVELLE,
Attorney for Plaintiff.
 C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 28, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [341]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO.,
Defendant.

Petition for Writ of Error.

Comes now the plaintiff, United States of America, and respectfully states to the Court:

I.

That heretofore on the 21st day of June, 1923, the verdict was rendered in the above-entitled cause in favor of the defendant, the Northern Pacific Railway Company, and against the plaintiff, United States of America, and that thereafter on the 26th

day of June, 1923, judgment was entered in said action in accordance with said verdict.

II.

That errors were committed in the records and proceedings and the rendition of said judgment to the substantial damage of the plaintiff, the United States of America, petitioner herein; that your petitioner is desirous of obtaining a review of said proceedings and judgment in the United States Circuit Court of Appeals for the Ninth Circuit herein.

[342]

III.

That your petitioner has filed herewith its assignments of error setting forth separately each error which your petitioner asserts appeared in said records, verdict, proceedings and judgment and which your petitioner intends to urge upon said review.

WHEREFORE your petitioner prays that a writ of error be issued herein and that the records, verdict, proceedings and judgment herein be reviewed by said United States Circuit Court of Appeals for the Ninth Circuit and that the said verdict be vacated and said judgment reversed, and that said cause be remanded to said District Court of the United States for the Western District of Washington, Northern Division for retrial.

THOS. P. REVELLE,

United States Attorney,

C. E. HUGHES,

Assistant United States Attorney,

M. C. LIST,

Special Assistant to the United States Attorney,

Attorneys for Plaintiff.

Dated at Seattle, Washington, July 17th, 1923.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [343]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO.,

Defendant.

Order Allowing Writ of Error.

Now on this 12 day of July, 1923, this cause came on to be heard upon petition for the plaintiff, the United States of America, praying for the allowance of a writ of error herein, and it appearing to the Court that there has been filed with the Clerk of this Court plaintiff's assignments of error as setting forth separately and particularly errors which are asserted and intended to be urged, it is, therefore;

ORDERED by the Court that a writ of error be issued herein as provided by law to review the records, verdict, proceedings and judgment in this cause wherein judgment was rendered in favor of the defendant, the Northern Pacific Railway Company,

against the plaintiff, United States of America,
on the 26th day of June, 1923.

Done at Tacoma this 17th day of July, 1923.

EDWARD E. CUSHMAN,
United States District Judge.

O. K. as to form.—C. H. W. [344]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [345]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO.,

Defendant.

Election as to Printing Record.

The plaintiff in the above-entitled action hereby files in the office of the above named court a notice of its election to take and file in the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record on writ of error on said cause, to be printed under the supervision of the

Clerk of the last named Court under and pursuant to the rules of said Court.

THOS. P. REVELLE,
United States Attorney,
C. E. HUGHES,

Assistant United States Attorney,
M. C. LIST,

Special Assistant to the United States Attorney,
Attorneys for Plaintiff.

Dated 17th day of July, 1923. [346]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [347]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Praeceptum for Transcript of Record.

The Clerk of the United States District Court at Seattle, Washington, in making up the record upon the writ of error in the above-entitled cause, is hereby directed to incorporate into the transcript

of the record on such writ of error the following only:

1. Plaintiff's complaint.
2. Defendant's answer.
3. Plaintiff's demurrer to defendant's answer.
4. Order of Court overruling plaintiff's demurrer to defendant's answer.
5. Plaintiff's reply.
6. Bill of exceptions and order allowing same.
7. Exhibits in the case.
8. Verdict.
9. Judgment entry.
10. Assignments of error.
11. Stipulation and order extending time for settlement of bill of exceptions.
12. Petition for writ of error.
13. Order allowing writ of error.
14. Writ of error.
15. Citation.
16. Clerk's return.
17. Election as to printing record.
18. This praecipe.

Attorneys for Plaintiff:

THOS. P. REVELLE,
United States Attorney.

C. E. HUGHES,
Assistant United States Attorney.

M. C. LIST,
Special Assistant United States Attorney.

C. H. WINDERS,
Attorney for Defendant. [348]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [349]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO.,

Defendant.

Order Re Transmission of Original Exhibits.

This matter having come on duly and regularly to be heard this 7th day of August, 1923, and it appearing to this Court that a stipulation has been entered into between the attorneys for plaintiff and defendant, it is therefore

ORDERED that the Clerk of the Court transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, the original exhibits introduced at the trial of this cause, in accordance with the above stipulation.

Dated this 7 day of August, 1923.

JEREMIAH NETERER,
United States District Judge.

O. K.—C. H. W.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 7, 1923. F. M. Harshberger, Clerk. [349½]

In the United States District Court for the Western District of Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 349½ inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [350]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 889 folios at 15¢	\$ 133.35
Certificate of Clerk to transcript of record, 4 folios at 15¢60
Seal to said certificate20
Certificate of Clerk to original exhibits, 3 folios at 15¢45
Seal to said exhibits20
<hr/>	
Total	\$ 134.80

I hereby certify that the above cost for preparing and certifying record, amounting to \$134.80, will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending September 30, 1923.

I further certify that I hereto attach and herewith transmit the original writ of error, and original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 16th day of August, 1923.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western Dis-
trict of Washington. [351]

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY CO.,

Defendant.

Writ of Error and Clerk's Return.

United States of America,—ss.

The President of the United States of America,
To the Honorable the Judges of the District
Court of the United States, for the Western
District of Washington, Northern Division,
GREETING:

Because, in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the said District Court, before you, at the May
term, 1923, thereof, between the United States of
America, plaintiff, and Northern Pacific Railway
Company, defendant, manifest error hath hap-
pened to the great damage of the said United
States of America as by its complaint appears,

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of San Francisco, California, [352] and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, on or before the 16th day of August, 1923, to the end that the record and proceedings aforesaid, being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 17th day of July, A. D. 1923.

Issued at office in Seattle, Washington, with the seal of the District Court of the United States for the Western District of Washington, Northern Division.

[Seal] F. M. HARSHBERGER,
Clerk, of the United States District Court, Western District of Washington.

Allowed by

EDWARD E. CUSHMAN,

Judge.

United States of America,
Western District of Washington,
Northern Division,—ss.

In obedience to the command of the above writ, I herewith transmit to the United States Circuit Court of Appeals for the Ninth Circuit, a duly certified transcript of the record and proceedings in the within entitled cause with all things concerning the same, in accordance with the praecipe for transcript filed herein.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the District Court of the United States for the Western District of Washington, Northern Division.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court, Western
District of Washington.

O. K. as to form—C. H. W. [353]

[Endorsed]: No. 7138. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Northern Pacific Railway Co., Defendant. Writ of Error and Clerk's Return. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD CO.,

Defendant.

Citation and Admission of Service.

United States of America, to the Northern Pacific
Railway Company, Defendant herein,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, thirty (30) days from and after the day this citation bears date, pursuant to writ of error filed in the Clerk's office of the United States District Court for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for

the Western District of Washington, this 17th day of July, 1923.

[Seal] EDWARD E. CUSHMAN,
Judge of the United States District Court. [354]

Due and personal service of the within citation is admitted this 18th day of July, 1923.

C. H. WINDERS.

Attorneys for Defendant and Defendant in Error. [355]

[Endorsed]: No. 7138. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Northern Pacific Railway Co., Defendant. Citation and Admission of Service. Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 18, 1923. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 4080. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. Northern Pacific Railway Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed August 20, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States District Court, Western District of
Washington, Northern Division.

No. 7138.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
Defendant.

**Order Extending Time to and Including September
1, 1923, to File Record and Docket Cause.**

It appearing to this Court that it is agreeable to the above-named parties that the time for filing record on writ of error be extended to September 1, 1923;

It is THEREFORE, ORDERED that the time for filing record on writ of error in the above-entitled cause in the Circuit Court of Appeals be, and it is hereby extended to September 1, 1923.

Done in open court this 15th day of August, 1923.

JEREMIAH NETERER,
Judge.

O. K.—C. H. W.

No. 7138. In the District Court of the United States for the Western District of Washington, Northern Division. United States of America, Plaintiff, vs. Northern Pacific Railway Company, Defendant. Order extending Time for Filing Rec-

ord on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 15, 1923. F. M. Harshberger, Clerk. By _____, Deputy.

[Endorsed]: No. 4080. United States Circuit Court of Appeals for the Ninth Circuit. Filed Aug. 20, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

**In the United States Circuit Court of
Appeals for the Ninth Circuit.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, DEFEND-
ANT IN ERROR.

*ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION.*

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

THOS. P. REVELLE,
United States Attorney.

C. E. HUGHES,
Assistant United States Attorney.

M. C. LIST,
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In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF tiff in error, v. NORTHERN PACIFIC RAILWAY COMPANY, defendant in error.	}	No. 4080.
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*ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION.*

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Government's complaint in this case consists of 18 causes of action, all alleging violations of various provisions of the Federal Safety Appliance Acts and Orders of the Interstate Commerce Commission, issued pursuant to authority contained in these Acts. (Rec. 2.)

For convenience, plaintiff in error is hereinafter referred to as plaintiff, or the Government, and the defendant in error as defendant, or the carrier.

It might be well to state at the outset that in this case the carrier challenges the right and duty of the Government to attempt "to promote the safety of employees and travelers" during the period when certain of its employees were on a strike, and that the

record clearly discloses that, during such period, the *defendant failed to do all that it could reasonably do in the interest of safety.*

There was a verdict for the defendant on all causes of action, *the verdict on the 18th cause of action being directed by the Court.* (Rec. 321.)

Each of the first 12 causes of action involves the movement of a defective car out of Auburn, Washington, on August 31, 1922. These 12 cars were moved out of Auburn in three commercial freight trains of defendant. (Ex. A2, A3, and A4.)

Auburn is a large freight division terminal of defendant (Rec. 40, 69), and during the times in question approximately 2,500 cars a day were moved in and out of that place (Rec. 199-200).

None of the 12 cars was picked up and put in a train that was merely passing through Auburn (Rec. 68), but each of the three trains was a commercial freight train assembled and made up at Auburn (Rec. 68; Ex. A2, A3, and A4), and none of them was in any sense a hospital train (Rec. 233.)

The next five causes of action, 12 to 17, inclusive, involve the movements of five cars in three trains out of Centralia, Washington, another freight division terminal (Rec. 69), and, as in the *Auburn case*, these three trains were commercial freight trains, not hospital trains, each being made up at Centralia (Rec. 69, 233; Ex. A1, A6, and A7).

Both Auburn and Centralia are repair points. (Rec. 40, 199, 208.)

None of the cars involved in this case contained any live stock or perishable freight, and 16 of them were flat cars, either empty or loaded with logs.

Train Extra 1263, engine 1263, left Auburn at 10.20 a. m. (Rec. 40), and included in its 28 cars were the cars referred to in the 1st, 2nd, and 10th causes of action (Ex. A3). Following are shown the cars and defects complained of:

Count.	Car.	Defects.
1.....	N. P. (flat) 67219.....	End handhold missing; violation of Commission's Order. (Rec. 39, 122.)
2.....	N. P. (flat) 61585.....	Uncoupling lever missing; violation of Sec. 2, Act March 2, 1893, as amended. (Rec. 41, 122.)
10.....	N. P. (coal) 58618.....	Ladder tread bent flat against side of car; violation of Commission's Order. (Rec. 43, 123.)

Ten of the other cars in this train were loaded with logs; others were loaded with coal, wheat, and sheep. (Ex. A3.)

The 3rd cause of action involves a car (N. P. flat car 68327) moved out of Auburn in train Extra 1616, engine 1616, which left at 10.10 a. m., containing in all 50 cars. (Ex. A4.) The car in question was defective in that the uncoupling lever was missing, a violation of Sec. 2 of the Act of March 2, 1893, as amended. (Rec. 47, 123.)

The remaining eight cars hauled out of Auburn moved from there in a commercial train, No. 930, engine 1784, at 9.50 a. m. This train consisted of 77 cars (Ex. A2), *including 24 bad-order cars* (Rec. 224), but in what respect they were in bad order, defendant

failed to show. The eight cars in question and their defects are shown as follows:

Count.	Car.	Defects.
4.....	N. P. (flat) 66150.....	Hand-brake wheel fouled by lading; violation Sec. 2, Act of April 14, 1910. (Rec. 48, 140.)
5.....	N. P. (flat) 61611.....	Hand-brake shaft bent; violation Sec. 2, Act of April 14, 1910. (Rec. 49, 141.)
6.....	N. P. (flat) 63242.....	Same as count 5. (Rec. 51, 141.)
7.....	N. P. (flat) 68347.....	Side handhold missing; violation of Commission's Order. (Rec. 52, 141.)
8.....	N. P. (flat) 67105.....	Hand-brake wheel missing; violation Sec. 2, Act of April 14, 1910. (Rec. 54, 142.)
9.....	N. P. (flat) 64764.....	Side handholds (2) missing; violation Commission's Order. (Rec. 54, 142.)
11.....	N. P. (flat) 67399.....	Side handhold missing; violation Commission's Order. (Rec. 55, 142.)
12.....	N. P. (flat) 65296.....	Same as counts 5 and 6. (Rec. 56, 142.)

Twenty-nine cars in this train were loaded with logs. (Ex. A2.)

The 13th cause of action relates to a car (N. P. flat car 61753), which left Centralia at 7.40 a. m. September 2, 1922, in train Extra, engines 1261 and 1611. At the time it left an end handhold was fouled by the lading, leaving no clearance, a violation of the Commission's Order. (Rec. 57, 142.) There were 39 cars in this commercial train, including 15 cars of logs. (Ex. A1.)

The 14th cause of action involves a car (N. P. flat car 64036) that was hauled out of Centralia on the same day at 10.30 a. m. in a commercial train, No. 969, at which time it had a broken sill step, a violation of the Commission's Order. (Rec. 59, 142.) There was some contradiction as to the number of the locomotive, but it is immaterial whether it was No. 1263

or 1265. (Rec. 59; Ex. A6.) This train contained 25 cars when it left Centralia. (Ex. A6.)

The other three cars were hauled from Centralia on the same day at 7.15 a. m. in a commercial train, Extra 1672, engine 1672, which consisted of 62 cars. (Ex. A7.) Following are the cars and defects:

Count.	Car.	Defects.
15.....	C., B. & Q. (flat) 90501.	Uncoupling lever disconnected; violation Sec. 2, Act of March 2, 1893, as amended. (Rec. 60, 143.)
16.....	N. P. (box) 24620.....	Lock link of coupler broken; violation Sec. 2, Act of March 2, 1893, as amended. (Rec. 61, 143.)
17.....	N. P. (flat) 63839.....	Hand brake chain broken; violation Sec. 2, Act of April 14, 1910. (Rec. 62, 143.)

The 18th cause of action will be referred to later.

The answer of the defendant (Rec. 20) embodied, 1st, an admission as to its interstate character and movements of the cars in question; 2nd, a general denial to the remaining allegations of each cause of action. This was followed by a so-called affirmative defense to all counts, reading, in part, as follows, the italics being ours:

* * * that on the 1st day of July, 1922, what are known as the joint shop craft employees, including those engaged in the work of inspecting and repairing cars and the doing of general mechanical work in connection with their upkeep, in protest of an award by the United States Labor Board, a board duly created by an act of Congress of the United States, ceased their employment and withdrew from the service of this defendant.

That said joint shop craft employees so leaving the service of this defendant did so notwithstanding the orders and findings of the United States Labor Board, acting for and on behalf of the United States, and without any fault on the part of this defendant, and that this defendant, pursuant to the directions of said United States Labor Board, proceeded to and used its best efforts toward obtaining other employees to perform the services of those who left its service and went on strike, and endeavored to perform its duties to the shipping public and its other duties as a common carrier, as imposed upon it by the so-called interstate commerce act and the various amendments thereto, and that in so doing it was required to use many of its official staff for the purpose of keeping its railway system in operation and move the various products, perishable and otherwise, tendered to it for transportation, so as to keep the public served by its line of railroad from sustaining irreparable damage and prevent a shortage of food and other necessities, and that as a consequence of the withdrawal of said shop craft employees it was for a period of a number of weeks physically impossible to keep accurate records of the condition of the various cars in the service of this defendant; that all of said cars were properly inspected, and that pursuant to the request as made by the plaintiff, through its duly constituted representatives, this defendant handled its equipment in a reasonable manner and *did not permit any equipment to*

be used which would endanger the safety of operation or of its employees or those having business with this defendant, and that if any of the cars referred to in the plaintiff's complaint were in the condition as referred to therein the same arose as the result of an emergency, and beyond the control of this defendant and without any default on its part, and the defects, if any, were remedied as soon as consistent in view of such emergency and after movements made necessary thereby, at the then nearest most available point therefor.

To this so-called affirmative defense the Government filed a demurrer, which was overruled by the lower Court. (Rec. 30, 31.)

A reply was then filed by the Government, putting in issue certain allegations of this affirmative defense. (Rec. 32.)

Then just before the trial a motion was made by the Government to strike from the answer this affirmative defense, which was also overruled. (Rec. 37.)

The case proceeded to trial. The Government rested its case on the testimony of two inspectors of the Bureau of Safety of the Interstate Commerce Commission. Each of these witnesses testified that he inspected every car in question on at least two occasions and noted their defective condition; that he saw each car leave Auburn or Centralia in the train heretofore referred to, at which time it was still in the same defective condition set forth in the Government's complaint, (Testimony Winter, 37,

and Weeks, 121, 140.) Each inspector made an independent record, concurrently made with each inspection and movement of each defective car, from which he refreshed his memory. (Rec. 69, 114, 122.)

It was soon apparent from the cross-examination of the Government witnesses that the defendant realized that it could not fairly overcome the effect of this clear and positive evidence of the Government; therefore it adopted the policy of attacking the veracity and fairness of these inspectors by suggestive questions not only as to their method of securing evidence but also with respect to certain phases of the strike situation and their sympathies in connection therewith. (Rec. 77, 78, 161, 163, 164.)

This was followed by testimony on behalf of the defendant, practically all of which was not only wholly immaterial but purposely sympathetic and effectively prejudicial.

It was understood at the outset of the trial, and consented to by the Court, that the plaintiff would have an exception to the testimony of each witness of defendant relative to the strike. (Rec. 196.)

Before taking up the many phases of the case we desire particularly to call this Court's attention to certain matters in order that it may be more impressed with the many errors that occurred at the trial, all of which were highly prejudicial:

In no single instance did the defendant attempt to show that it was hauling any car for the purpose of repairing the defects complained of by the Government.

There was some little negative testimony to the effect, and it was defendant's contention, that, excepting as to the 8th count, all the remaining eleven cars hauled out of Auburn *were in good condition when they left in the trains in question.* (Rec. 250, 256, 260.)

As to the 8th cause of action, there was some testimony to the effect that the car was *defective in respects other than that claimed by the Government* (a missing hand-brake wheel), undiscovered by defendant (Rec. 53, 250, 265), *but no contention was made that defendant was hauling the car for the purpose of putting on a new brake wheel, or that such movement was necessary for the purpose of remedying a slight but serious defect of that kind.* In fact, two witnesses of defendant who testified they inspected this car said it did not have a brake wheel missing (Rec. 250, 265).

One of the principal witnesses for defendant, its mechanical superintendent (Rec. 210, 265), testified that they would make a temporary repair of that nature at Auburn even where the car had other defects, although in this respect he was contradicted by another of defendant's witnesses who worked at Auburn. But the testimony on behalf of defendant was significantly silent as to the nature of the "other defects" which it was claimed had to be repaired at some point other than Auburn. This may have been because defendant thought *these other defects were undoubtedly not serious*, for defendant alleged in its so-called affirmative defense that "it did not permit any equipment to be used which

would endanger the safety of operation or of its employees." (Rec. 28.) But no attempt was made to prove such allegation.

As to the *Centralia* cases, there was also some little negative testimony to the effect that the five cars were also in good condition when moved from that place in the three trains in question. (Rec. 130, 275.)

It will thus be seen that if sixteen of the seventeen cars were not defective, as claimed by the defendant, and that if the other car (8th count) was not being hauled, nor had to be hauled from Auburn, for the purpose of replacing a small hand brake wheel, the mass of testimony relative to the strike, the sympathies of the witnesses in connection therewith, the acts of sabotage on the part of strikers and their sympathizers, the I. W. W. atmosphere injected into the case, were all irrelevant, immaterial, purposely sympathetic, and prejudicial.

But to review these errors somewhat in detail:

The defendant attempted to show, over objections, that the Government did not notify certain of defendant's officials that the cars were in bad condition. (Rec. 79.) This was because, in the past, the inspector (witness Winter) had found that such reports did no good. (Rec. 116.) But notwithstanding that, and for the purpose of clearing the atmosphere of any unfairness on the part of the Government witnesses, the Court refused the Government's offer to prove by this same witness that on the same day (August 31st) he inspected about 200 cars; that he found approximately 50 of them

defective; and that he reported the result of that inspection to defendant's officials. (Rec. 117.)

It was then suggested on cross-examination that the witness Winter was sympathetic with the strikers, and that he did not find certain defects but that the same had been pointed out to him by strikers. (Rec. 78.) This was somewhat suggestive, and its purpose seemed plainly apparent; but notwithstanding which, the Court refused to allow the witness Winter to show how long it was after the strike went into effect before he reported any cases against the Northern Pacific for prosecution; and similarly, the Court refused to permit the witness to testify that some of the employees of the Northern Pacific had accused him of being too fair to the company. (Rec. 118.)

The witness Weeks, on cross-examination, was asked if the "company was laboring under any burden at that time in the Centralia yard." And against objections, he replied that there was a strike on. (Rec. 161.)

But the witness Weeks was then compelled, on cross-examination, to go far beyond the rule of reason and evidence and *admit that he had heard* that in the Auburn and Centralia yards, *and in other yards of the Northern Pacific not involved in this case*, acts of sabotage had been committed by strikers or their sympathizers; that is, that after trains had been made up, air hose had been cut, grab irons knocked off, angle cocks damaged, and that the strikers or sympathizers had "otherwise attempted to render the equipment defective." (Rec. 163, 164.)

But for a moment to refer to the 13th cause of action:

This was a car hauled out of Centralia, so loaded with logs that they completely fouled the handhold on the end (Rec. 58, 59, 142); the result was that the handhold had no clearance and the brakeman no protection when coupling and uncoupling cars.

The contention of the defendant was that this car was not defective in that respect; that the Northern Pacific flat cars were so constructed that such a situation *could not arise; and that defendant's officials had never heard of such a case.* (Rec. 130, 131, 226, 227, 277.)

But the Court, having admitted such testimony, refused to permit the Government to prove by the witness Winter that prior to that time he had frequently made reports to the Interstate Commerce Commission of flat cars being so loaded with logs as to foul the end handhold; and that at the time of making such reports defendant's Car Foreman and its Inspector of Equipment also took down the numbers of such defective cars in his presence. (Rec. 187.)

As part of defendant's testimony to the effect that the car in the 13th cause of action could not be so loaded with logs as to foul the handhold, witnesses for defendant testified that these cars had six-inch bunks on them, which would raise the logs up; also that the handholds were so applied to the end sill as to prevent such fouling. (Rec. 130, 131, 227.)

But the Court would not allow the Government to prove by several witnesses that during the time this trial was going on they had found a number of

similar flat cars in the Northern Pacific yards with handholds on the ends so applied that they could be fouled by logs; and that one such car was found that morning, June 21st, 1923, at Auburn, so constructed and loaded that a shifting of the logs *as much as one inch* would completely foul the handhold, and that such fact was admitted by defendant's Chief Car Inspector, who accompanied these witnesses. (Rec. 194.)

Then, with full knowledge that it did not intend to prove that any car had to be moved from Auburn or Centralia to repair any appliance complained of, defendant further injected into the case all kinds of testimony, *including hearsay*, relative to the strike situation.

To put some of this irrelevant strike testimony in a nutshell:

The witness Crosby, defendant's mechanical superintendent, testified that the machinists and car repairers, with the exception of a few, went on a strike July 1, 1922; that they had instructions not to hire any outside men; that the inspection and repair work was largely done by the foreman and officers of the road; that on July 18th they started to hire new men; that the men worked long hours; that the men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; that the cars were assembled in a train and then inspected; that some time prior to the train moving away the hose was severed; that in one case they had 22 hose cut before the train got out

of Auburn; that in other instances the air hose and steam hose were filled with waste; that the refrigerator cars in Seattle had to be set on the steam track and connected up with steam so as to keep those men (strikers or sympathizers) from filling them up with waste and other foreign substances; that it was a question of endurance so far as the company was concerned. (Rec. 196-198.)

Then to intensify or pyramid this sympathetic, prejudicial testimony, the witness Crosby was required to testify that they did not have sufficient men at Auburn to repair the 20 log cars that left Auburn in one of the trains (train No. 930, also containing eight of the defective cars in question), which 20 log cars were being taken to Renton for repairs (Rec. 198, 199.).

Now, these 20 cars were not involved in this case; but even if material, it was not shown in what respect they were defective, or what repairs were made, *or, more important and germane, if relevant, what repairs were actually needed when they left Auburn, or the place where the defects were first discovered*, which was not Auburn. (Rec. 224.)

Then, well knowing that it was not corroborative of its negative testimony that the cars were not defective, or material to any issue, defendant also proved by the witness Crosby that the reason they made no efforts to employ new men before July 18th was because of a hope or impression that the men would come to their senses and return to work; that defendant's men gave him to understand that

they did not leave because of any dissatisfaction with the company; that the Chairman of the different crafts went back east, either to Chicago or Washington, for the express purpose of making a separate agreement so far as the Northern Pacific was concerned, and that they were refused by Mr. Jewell. (Rec. 200.)

The witness McCullough, then defendant's superintendent, was also permitted to testify that at 10 a. m., July 1st, he was waiting to see what would happen; that at 10 o'clock it did happen; that all the car repairers and inspectors at Seattle, Tacoma, and *Portland* quit; that about two old men stayed at Tacoma, and one at Seattle; that they called in volunteers, who had already been consolidated; that he went to Auburn that day and found only the car foreman and bridge inspector working; that under normal conditions prior to July 1st, and at the time of testifying, there were four regular car inspectors working eight hours, and two or three other men doing light repairing and oiling; that during the strike period and up to August 31st it was a well-known fact and not disguised that train crews were keeping a pretty close eye on the equipment; that they used to tell him about it and try to run a bluff on him about having a large number of cars leaving in a defective condition; that once in a while they would falter around and hold up trains; that some of them were particular about taking a train out if there were any defects; that they (the officers) were par-

ticularly careful to see that everything was fixed, but that the men would still try to find fault; *that he did not see any of the cars involved in this suit; but that the car involved in the 8th count was going to Renton for general repairs, "together with twenty-three or twenty-four others just like it."* (Rec. 216-224.)

Then, along the same line, the witness Crawford was also allowed to testify for the defendant to the effect that at that time the Auburn Terminal was as busy as probably it ever was or ever might be again; that the attitude of the trainmen was most critical; that they departed from their regular path of duty to inspect and examine; that he had seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily and would refuse to do if told to do it ordinarily; that they were most particular to find a defect; that it was not always a defect that amounted to anything; but that if it was anything they could kick about, they took occasion to do so; that the inspection forces consisted almost entirely of the officers; that there was some interference from outsiders; that there was a great deal of interference from people who were apparently employees; that this was in connection with the operation of the air brakes and other matters pertaining to the cars. (Rec. 248, 249.)

Then the witness Burnham was permitted to testify that about that time, August 31st, the attitude of the trainmen was most critical; that they generally did as much inspecting as the others; that their intention was to delay train movements; that crews

held up trains, claiming something was wrong; that this was a common occurrence on train No. 930; that the other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen; that they tried to make it appear that the inspection which was being made was not effective; that the operation of the air brakes was interfered with; that they hindered them in every way possible. (Rec. 254-256.)

Then the witness Alsip testified to acts of sabotage (Rec. 268, 269); also that the situation at Centralia was very critical around September 2d; that they were handicapped in getting help at Centralia because it had a notorious reputation as an I. W. W. center; that when they did get help, they would only dare to put them to work in the daytime (Rec. 274, 275).

Before concluding this statement of the case, we again desire to impress upon the Court the fact that in no single instance was any of the cars involved in the first seventeen causes of action being hauled from Auburn or Centralia for the purpose of repairing any defect complained of. As to the 8th cause of action, *there was not even a mere suggestion by defendant* that the hand-brake wheel could not have been repaired at Auburn; in fact, the defendant did not know that the brake wheel was missing. (Rec. 53.)

Then, forgetting its so-called affirmative defense, defendant introduced evidence to the effect that the hand-brake wheel on the 8th count car was not missing (Rec. 249, 250); and similar testimony was given, on

cross-examination, by another of defendant's witnesses (Rec. 265).

As to the remaining sixteen causes of action, the defendant similarly contended that the cars were not defective, and it is evident that its sole purpose in introducing the irrelevant testimony about the strike, the I. W. W. element, etc., was to becloud the issues, to create sympathy, and to prejudice the Government's case.

But notwithstanding the fact that repairs were being regularly made at Auburn and Centralia; that sixteen of the seventeen cars were claimed to be in good order when hauled out of these points, and that the 8th count car was *not* defective as alleged and was not being hauled for the purpose of replacing a small brake wheel, the Court instructed the jury that it was "authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and *whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective.*" (Rec. 298.)

The 18th cause of action presents a question of law that was passed upon by this Court in the case of *United States v. Northern Pacific Railway Company*, decided March 18, 1923, and reported in 287 Fed. 780, which the lower Court, in this case, refused to follow, although we can see no difference between the facts in that and the instant case.

Briefly, the following are the facts with respect to the 18th cause of action:

On September 7, 1922, the defendant received from the Great Northern Railroad, at the interchange track between the two roads in Seattle, a box car loaded with wheat (Rec. 63, 105), destined, as suggested on cross-examination by a question of defendant's counsel, for some point on defendant's line (Rec. 105, 171). Without any inspection of any kind, defendant received this car and hauled it in the defective condition (low coupler or drawbar only 30 inches high) from the interchange track into its Seattle yard, over one-half mile (Rec. 143, 171). This car was in between two other cars, but it was not necessary to move the several cars to the Northern Pacific yard, even had defendant not wanted to accept the defective car in that condition; it could have been switched out on the interchange track (Rec. 107, 108) and turned back to the Great Northern for repairs.

But notwithstanding this state of facts, the Court directed a verdict for the defendant. (Rec. 293.)

Without going into detail, it is sufficient to say that all the defects complained of in the eighteen causes of action were of a serious nature (Rec. 144), which fact was not contradicted.

It is unnecessary now, we believe, to refer to the many errors of the Court in charging the jury, and its failure to give certain instructions requested by the Government; these are set forth in the Assignments of Error, beginning on the following page and will all be discussed later on.

ASSIGNMENTS OF ERROR.

(1) The Court erred in overruling plaintiff's demurrer to the affirmative defense set forth in defendant's answer. (Rec. 30, 31.)

(2) The Court erred in overruling plaintiff's motion to strike from the defendant's answer the affirmative defense therein set forth. (Rec. 37.)

(3) The Court erred in overruling plaintiff's objection to the following question asked of the witness Winter by counsel for the defendant and the answer thereto (Rec. 79):

Q. Did you ever say anything to Mr. Burnham or any of the other gentlemen there—Mr. Burnham or Mr. Crawford or Mr. Allmain, this gentleman here, or Mr. Alsip, back here—at Centralia about the cars you are complaining about in this case?

A. No, sir.

(4) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 116):

Q. State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment?

(5) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 118):

Q. It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went

into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

(6) The Court erred in refusing to allow the witness Winter to answer the following question asked by counsel for plaintiff (Rec. 118):

Q. Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed out defects to you upon which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the Northern Pacific did not accuse you of being too fair to the Northern Pacific?

(7) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 161):

Q. I mean just what I said. Was the company laboring under any burden at that time in the Centralia yard? Any unusual burden?

Q. Was there a strike on in the Centralia yard?

Q. Was there a strike on?

A. Yes, sir.

(8) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 161, 163):

Q. Isn't it a fact that your attention was called to the fact that in the Centralia yard,

the Auburn yard, and other yards of the Northern Pacific, after a train was made up and defects were repaired, either the strikers or sympathizers with the strikers would come along, cut the air hose, and knock off grab-irons?

Q. You have testified that you had learned that there was a strike down at Centralia. I will ask you if your attention was not called, both at Centralia and Auburn—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane, that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle cocks, and otherwise attempted to render the equipment defective.

A. I have been told that.

(9) The Court erred in overruling plaintiff's objection to the following question asked of the witness Weeks by counsel for defendant and the answer thereto (Rec. 172):

Q. It is your opinion, Mr. Weeks, knowing the conditions you did know at that time, that it would have been reasonably safe for any man—official or new employees of the Northern Pacific—to go out on that transfer between the street car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this drawbar?

A. It would have been as safe there as any other place on the road, in my opinion.

(10) The Court erred in refusing to allow the plaintiff to prove by the witness Winter that prior to the time involved in this case he had frequently made reports to the Interstate Commerce Commission of Northern Pacific flat cars being so loaded with logs as to foul the end handhold; that at the time of making such reports the Car Foreman and Inspector of Equipment of the defendant also took the numbers of such cars in his presence. (Rec. 187.)

(11) The court erred in refusing to allow the plaintiff to prove by the witness Winter that on the morning of June 20, 1923, in company with Mr. Pitts, another inspector of the Interstate Commerce Commission, and a Mr. Hazen, defendant's Chief Car Inspector at Auburn, they made an inspection of a number of flat cars similar to the one involved in this case, and that the bunks on same were only four inches in height. (Rec. 193.)

(12) The Court erred in refusing to allow plaintiff to prove by the witness Winter that at the same time and place and in company with the same persons mentioned in Assignment of Error No. 11 they found a car similar to the one involved in this case loaded with logs; that there was just practically three inches clearance between the logs and the handhold, and that if the logs shifted as much as one inch the logs on that car would have completely fouled the handhold on the end of the car, and that this fact was so admitted by defendant's Chief Car Inspector. (Rec. 194.)

(13) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto (Rec. 196-198):

Q. I wish you would state to the jury briefly and clearly so they can hear you the conditions confronting the operations of the Northern Pacific so far as its equipment was concerned, so far as inspectors and car repairs were concerned, from the 1st of July up to the 2nd of September, with particular reference to Auburn and Centralia.

A. On the first of July, as practically everyone knows, and of course railroad men better than anyone else, the railroad employees right down to the wipers went out—I think in Seattle a few wipers remained. So far as the car repairers and mechanics and everything of that kind is concerned, they walked off the job. We had instructions not to hire any outside men, and as a result of that it devolved on the officers and men, the few who remained—of course the foremen, car foremen, in practically all cases remained to work. They did at Auburn and at points where Mr. Winter has mentioned. Besides the foremen, the work was largely done by other officers of the railroad. That condition continued up until July 18, when we started to hire a few men, the best, of course, that we could secure. But, as you all know, the men that we could hire under those conditions were not like the men that ordinarily do that work. However, we did

get some good men after a while. We struggled along and did the best we could with what we had to do it with. The men worked long hours. The men who were accustomed to office work worked night and day, and some of them worked 22 or 23 or 24 hours a day; couldn't work any more than that. We worked along in that way. Now, I have heard some matters brought out here in connection with the inspection of trains that really seemed inconsistent to me, in that the cars were not inspected in the way that they were ordinarily inspected when we have the regular organized force of inspectors. That was true. We did not have the men to do it. The cars were assembled in the train, and they were inspected by these officers that I have mentioned. Sometimes prior to the train moving away—as has been brought out here—the hose were either severed—generally I will say they were stabbed with a knife blade, not cut in two, just a knife blade inserted—and in one case we had 22 hose cut before we got out of Auburn. In other instances we had to go around—the hose were filled with waste, both the air hose and the steam hose. The refrigerator cars here in Seattle we had to set them on the steam track and connect them up with steam so as to keep those men from filling them up with waste and other foreign substances. Taking the whole matter, it was a question of endurance so far as the Company was concerned. Everybody was working the constitutional limit. Every nerve was strained. There is

no question about that. I don't know of anything that could have been done that was not done with the force available.

(14) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the answer thereto (Rec. 198, 199):

Q. On the 31st of August, the evidence will show, on train leaving Auburn as was testified at 9.50—as a matter of fact it registered out at ten—he had on that twenty log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we at that time on the 31st of August have men available to put them in condition at Auburn?

A. I would say no. We did have men but not sufficient.

(15) The Court erred in overruling plaintiff's objections to the following questions asked of the witness Crosby by counsel for defendant and the replies thereto (Rec. 200, 201):

Q. Now, Mr. Crosby, when was it that the Northern Pacific—or was there any particular reason why the Northern Pacific did not start to hire any men until about the 18th of August—18th of July, I should say?

A. Our purpose for not employing men was by reason of our having the hope or an impression that the men would come to their senses and return to work. Our men who left the service did not do so because of any dissatisfaction that they had with the North-

ern Pacific. That is, they all gave me to understand that. I am pretty close to the workingmen.

Q. Was there any of these men went back East at that time, Mr. Crosby, or not?

A. The chairman of the different crafts. I don't know just how many of them went either to Chicago or Washington for the express purpose of making a separate agreement in so far as the Northern Pacific was concerned and were refused by Mr. Jewell. I was looking up some letters on that. I did not have time before I left the office. We have it on record.

Q. It was not until after those men returned that you tried to hire outsiders?

A. I can't remember the date that they went down; I would not want to testify on that. I don't believe that we did.

(16) The Court erred in overruling plaintiff's objections to the following question asked of the witness Crosby by counsel for defendant and the reply thereto (Rec. 201):

Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue, having the standpoint of the safety of the men and the safety of the equipment and the property in mind?

A. No; I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself.

(17) The Court erred in overruling plaintiff's objections to the following question asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 215, 216):

Q. On July 1st what were you doing?

A. On July 1st at 10.00 a. m. I was waiting to see what would happen. At 10.00 o'clock it did happen. Everybody quit—all the car repairers, inspectors taking cars of the equipment at Seattle, Tacoma, and at Portland. I believe about two old men stayed to work at Tacoma. I believe one at Seattle. Then we made the necessary arrangements; we called in volunteers. We had them already consolidated. We got in touch with them and kept our King Street station working and getting our passenger trains out of town. That is the first thing that we did that afternoon. The next morning I got over into Auburn and Kent. I found the situation over in Auburn—I went out there July 1st and I found the car foreman and the bridge inspector the only two men working in the yards inspecting trains.

(18) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 216-218):

Q. You were familiar with the conditions in Seattle and Auburn up to the 31st of August, were you, Mr. McCullough?

A. Yes, sir.

Q. When was it that the company first started to employ new men?

A. We were directed to not do it, and I think that ban was lifted on either July 18th or 21st. I am not positive. I believe it was July 18th.

Q. Just tell the jury now, up to August 31st, what the conditions incident to and surrounding the operation of the Auburn yards were with reference to the inspection of trains and the making of repairs at that point, and in what way it was different from normal?

A. Under normal conditions and prior to July 1st, and at the present time, there are four regular car inspectors working eight-hour shifts, and two or three other men doing light repairing and oiling, and so forth. Probably somewhere between 20 and 25 men employed at Auburn inspecting cars and making light repairs and taking care of oiling boxes.

Q. When with reference to the cars being put on the train are these repairs made?

A. Normally?

Q. Prior to the strike; and now.

A. Most all of the repairs were made on the repair track, except small defects which inspectors would find.

Q. You are talking about during the strike period?

A. No; now.

(19) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto (Rec. 219, 220):

Q. During this same period up to August 31st, what is the fact as to whether or not

these train crews were keeping a pretty close eye on the equipment?

A. That was a fact that was well known and not disguised. They frequently used to tell me about it and try to run a bluff on me about having a large number of cars leaving in a defective condition. I asked them to give me the car numbers, and told them if they found any cars defective I would be very glad to have them show me. I told that to the chairman of the Brotherhood Committee.

Q. Would they sometimes hold up the trains?

A. Once in a while they would falter around there about something.

Q. Were they particular about refusing to take the train out if there were any defects?

A. Oh, yes. Not all of them. Certain men. We would be particularly careful to see that everything was fixed. They would still be trying to find fault.

Q. These questions that I am asking you are general questions. You did not see those particular cars yourself, did you?

A. You mean that the suit was brought on?

Q. Yes, sir.

A. No, sir. I might have seen them at other dates.

(20) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough with respect to car No. 67105 and the answer thereto (Rec. 223, 224):

Q. That is the eighth cause of action. What was the condition of that car when it left Auburn?

Q. Why was it going to Renton?

A. For general repairs together with twenty-three or twenty-four others just like it.

(21) The Court erred in overruling plaintiff's objection to the following question asked of the witness McCullough by counsel for defendant and the answer thereto (Rec. 226):

Q. What efforts had you used toward getting men at Auburn for the purpose of keeping equipment in repair and keeping commerce passing through there moving?

A. After we were authorized to employ men almost everything was done to secure them; through advertising, men personally sent to different places—I think we sent one man to Los Angeles or San Francisco, I don't know which—men were shipped in from all parts of the country. We had an office open in the Arcade Building in Seattle. Every newspaper carried one or more advertisements. We would hire any man, didn't care what he was, to go out and get some of the work done.

(22) The Court erred in overruling plaintiff's objection to the following questions asked of the witness McCullough by counsel for defendant and the answers thereto (Rec. 229):

Q. Supt. McCullough, being familiar with the situation that existed in Seattle on the 31st day of August—or rather on the 7th day of

September—would you say that it would be reasonable to have attempted to make repairs of any character upon that transfer track, located, as it was, in the public street and not on the property of the company, and between the street car track and the paved portion of Whatcom Avenue?

A. It would be very unsafe, unless the men doing the work were heavily guarded.

Q. Would it, in your opinion, knowing the situation and the obligations of the company to the city and the officials of the city and the government—would it have been countenanced by anyone exposing the men out there at that time for the making of repairs?

A. My impression is it would not.

Q. As a matter of fact, at that time the United States was trying to furnish protection, was it not?

A. Yes, sir; and we refrained from putting even inspectors out there. It was one of the last things that we would have done, because we did not want to put them there. We were afraid.

(23) The Court erred in overruling plaintiff's objection to the following question asked of the witness Crawford by counsel for defendant and the answer thereto (Rec. 248, 249):

Q. What was the situation out there around about the 1st of September? Just tell the jury with reference to the work and with reference to the trains going out, and the conduct of the conductors—of some of the conductors—and

brakemen in taking out their train. You were there. Tell them.

A. In the first place, we were doing a very large volume of business. The Auburn terminal was as busy then as probably it ever was or ever may be again. The attitude of the trainmen was most critical. I mean by that that they departed from their regular path of duty to inspect and examine. I have seen a brakeman crawl under the cars to find a defect, a thing which they don't do ordinarily, and would refuse to do if they were told to do it ordinarily. So that, in addition to our inspection, which was close, we had the assistance in that way of the conductor and his three brakemen. And, as I say, they were most particular to find a defect. It was not always a defect which amounted to anything; but if it was anything they could kick about, they took the occasion to do so, and we either repaired the car without dispute or carded it "bad order" and had it sent out of the train. The inspection force consisted almost entirely of the officers of the company, and there was some interference from outsiders—a great deal of interference from people who were apparently our employees—in connection with the operation of the air brakes on the train and other matters pertaining to the cars.

(24) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Burnham by counsel for defendant and the answers thereto (Rec. 254-256):

Q. What was the attitude along about the 31st of August of the train crews with reference to taking out trains? Was it critical or otherwise?

A. They were very critical. As a matter of fact, the train crews generally did as much inspecting as we did. The intention was to delay the movement of trains as much as possible. That was the impression we gained—the only impression that we could gain after what we saw they were doing.

Q. At that time were your trains being held up by these crews claiming something was wrong?

A. Yes, sir.

Q. Was that a common occurrence?

A. That was a common occurrence on train 930.

Q. That is, this train that went out of Narco?

A. Yes, sir.

Q. Just tell the jury about what conditions were around there at that time, Mr. Burnham.

A. The other brotherhoods seemed to do everything that they could to help the cause of the striking shopmen. That is, they tried to make it appear that the inspection which was being made by the men that were there was not effective, and they even went so far as to cut the hose after we had—I will have to explain that first before I get into that. The first thing we did, we asked the engineer to apply the air. Then we went along the train and made an inspection of the hose to see if there was any leaky hose or anything

else that might appear. Then we asked the engineer to release the air. We would find in some cases that after the air had been applied angle cocks had been turned, or sometimes if we happened to be in the center of the train—a train of 75 cars—some way or other the angle cocks at the rear of the train were opened up so the brakes were not effective. As a matter of fact, they hindered us in every way possible.

(25) The Court erred in overruling plaintiff's objection to the following question asked of the witness Alsip by counsel for defendant and the answer thereto (Rec. 268, 269):

Q. What were the conditions on that date, that is, the surrounding conditions, as to—well, as to your safety at night, and what was being done to your equipment after you had it examined and attempted to repair it?

A. I think probably we had as much interference at Centralia as any other one place in the Northwest territory. First of all, Centralia is a notorious place, as you know. We were continually interfered with in making up our trains and inspecting our trains and connecting the air. Even after we had passed one of our trains and given the engineer the signal to set the air and release the air we have found and been notified in some cases of malicious acts on the part of unknown persons which resulted in defects such as we are talking about now—cutting levers disconnected, air hose cut or pulled apart, and in some instances the stirrups were bent off by

the use of bars, same as we would use in straightening and opening the angle cock to prevent our getting a full air pressure. And numerous other things such as Mr. Crosby spoke of—waste being placed in the hose, and the gaskets taken out, and numerous other things.

(26) The Court erred in overruling plaintiff's objection to the following questions asked of the witness Alsip by counsel for defendant and the answers thereto (Rec. 274, 275, 288):

Q. I don't know whether I asked you or not, but how were you being treated along this time when things got very critical about the 2nd of September by the train crews when taking out their trains? Were they particular about the condition of their equipment when it went out of Centralia?

A. They were giving the trains as good an inspection as we could possibly give them, and they had instructions from their various officers—their organizations—to take records and report any cars that were not in shape and also to refuse to take them. In many cases they would delay the trains. I have seen trains in Centralia delayed as high as one hour waiting for some of us to come and make some minor repair or to have a car set out, and in some instances I have had to use this particular crew that was objecting to the condition of the car to make a set-out of the car, because the switch engines were not available. The situation—the condition was very critical, especially at

Centralia. That is borne out by not only the records but the news items during that time that we were not able to get help at Centralia, largely for the reason that Centralia had a notorious reputation as an I. W. W. center. While a great many other points were supplied with help, we could not get men to go to Centralia. When we did, we only dared to put them to work in the daytime. That left Mr. Nixon and myself to work in the nights continuously. In fact, I was not released at Centralia until October 12th. I was continually in service from July 1st to October 12th. Only by the aid of my automobile we were able to keep up with the game.

Q. You knew the men that you were able to get?

A. I know we were having a great deal of difficulty to get any men to go to Centralia at that time by reason of the I. W. W. and other elements that seemed to infest that particular locality.

(27) The Court erred in refusing to allow the witness Weeks to answer the following questions asked by counsel for plaintiff (Rec. 292):

Q. Mr. Weeks, some question has been brought into this case by some of the witnesses, particularly Mr. Alsip. He said these cars were not equipped with handholds on the end of the flat cars so that they could come up to less than two inches from the top of the floor. I am going to ask you to state if you recently made any inspections of any flat cars for the

purpose of seeing whether they were equipped with handholds that come up to less than two inches from the top of the floor.

Q. I want to make it a little more definite. I am going to ask the witness one more question. Mr. Weeks, state whether or not yesterday morning you inspected a number of flat cars in the yards of the Northern Pacific for the purpose of ascertaining whether or not the handholds on the ends were applied at the top so that they could be fouled by lumber or logs.

(28) The Court erred in that part of its charge to the jury, wherein it said (Rec. 298, 310):

There has been considerable said in the evidence and in the argument regarding the effect of the strike. You are authorized to take what the evidence has shown regarding this strike into account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective. You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops, tools, equipment, and ma-

chinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this law to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great.

(29) The Court erred in that part of its charge to the jury wherein it said (Rec. 299, 312):

A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways.

(30) The Court erred in that part of its charge to the jury wherein it said (Rec. 308, 312):

If the inspection is made within a reasonable time before the train leaves and the company—the defendant—has no reasonable apprehension that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, if mischievous individuals for any reason after that inspection

inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, if it did not discover them until it was out on the line, unless the circumstances were such as to render them so glaring that they could not be overlooked in the exercise of that high degree of care to which they are bound by the Act.

(31) The Court erred in that part of its charge to the jury wherein it said (Rec. 309, 312):

After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired, then to take them to the nearest available repair point and remedy the defects.

(32) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighth cause of action, same being included in plaintiff's request for Instruction No. 1 (Rec. 313):

The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(33) The Court erred in refusing to direct the jury to return a verdict in favor of the plaintiff on the eighteenth cause of action, the same being

included in plaintiff's request for Instruction No. 1 (Rec. 313):

The Plaintiff requests the Court to direct a verdict in its favor on each of the 18 causes of action, this motion to apply separately as to each cause of action.

(34) The Court erred in refusing to submit the eighteenth cause of action to the jury, as requested by the plaintiff by its request for Instruction No. 2 (Rec. 314):

In the event the Request No. 1 is refused as to any cause of action, Plaintiff requests the Court to instruct the jury as follows with respect to such cause of action.

(35) The Court erred in directing a verdict for the defendant on the eighteenth cause of action and entering judgment thereon. (Rec. 293, 313.)

(36) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 5 [3] (Rec. 313, 314):

If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

(37) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 8 (Rec. 313, 314):

It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to

inspect and repair the cars involved in this case.

(38) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 9 (Rec. 313, 314):

The provisions of the safety appliance acts are of such nature that they can not be ignored or set aside by a carrier on the ground that a strike has interfered with its operations. But the safety of other employees, those who operate trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

(39) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 12 (Rec. 313, 314):

In order to comply with the spirit of the law, the defendant can not establish a division terminal and make up trains at such terminal and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government.

(40) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 13 (Rec. 313, 315):

As to each of the cars hauled from Auburn or Centralia, the jury must return a verdict

for the Government unless the defendant has shown—

1st. That such car had been properly equipped with the appliance prescribed by the Act of Congress and the Orders of the Interstate Commerce Commission.

2d. That the defective equipment became defective while being used by the defendant on its line of railroad.

3d. That the defendant, through its officers or agents, had discovered the defects.

4th. That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia.

5th. That such car was actually repaired at the nearest available point from Auburn or Centralia.

(41) The court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 14 (Rec. 313, 315):

The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars can not be assembled together in a train and hauled from a terminal, some for repair and some in commercial service. And the burden is on the defendant to show that this was not done.

(42) The Court erred in refusing to instruct the jury as follows, the same being plaintiff's request for Instruction No. 15 (Rec. 313, 315):

The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, can not be considered as an excuse for not repairing the defective equipment in question.

(43) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 8 (Rec. 316):

By its eighth cause of action the Government has alleged that, in the violation of the Act of Congress therein referred to, the defendant moved its own freight car from its Auburn yard with the hand-brake wheel missing. The defendant admits that this particular freight car, being its own car No. 67105, was in a defective condition and alleges that the same was being transported empty to Renton for the purpose of being placed in repair, and I instruct you that under the Act of Congress, which is the foundation of the several causes of action in the plaintiff's complaint, it is provided that where railroad cars have become defective or insecure, while such cars are being used by a carrier on its own line railroad, that then such car after the discovery of such defect may be hauled from the place where it was first discovered to be defective or insecure to the nearest available point where such car can be repaired; if such movement is necessary to make such repairs and such repairs can not be made except at such repair point, that this can be done without liability for the penalties imposed under the terms of such

act. It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by "necessary" I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired, and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by the defendant for such purpose was not a violation of the law; and if you so find, your verdict should be for the defendant on this cause of action.

(44) The Court erred in instructing the jury as follows, the same being substantially defendant's request for Instruction No. 11 (Rec. 316, 318):

It is alleged, and it is an admitted fact, that the defendant is an interstate carrier of freight and passenger for hire, and as such it was its duty, as a matter of law, during the period referred to in the several causes of action herein, to use every reasonable effort to perform its duties as a common carrier of freight and passengers. The defendant by its answer has alleged that at said period, and without fault on its part, certain of its

employees had left its service in protest against certain orders and directions made by the United States Labor Board, and that among such employees were its car inspectors and car repairers, and that in order to perform its duty to the public it was, pending its ability to obtain other employees, necessary that it use many of its other officers and employees for such purpose, and that by reason of the circumstances and conditions surrounding the withdrawal of such employees it did not have available the repair facilities that it would have otherwise had, but that it did make all repairs necessary to comply with the Act of Congress referred to and the regulations issued pursuant thereto as alleged in the several causes of action herein, and I instruct you that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving; and in determining the disputed questions of fact in this case that you have a right to take into consideration the surrounding circumstances and conditions as they existed at the times alleged in the complaint herein insofar as the same have been established by the evidence. While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you and the evidence in connection therewith.

QUESTIONS INVOLVED.

1. Did the trial Court err in overruling plaintiff's demurrer to defendant's affirmative defense and in refusing to strike same from the answer? (Assignments of Error 1 and 2. See page 20 hereof.)

2. Did the trial Court err in admitting certain evidence offered by defendant and objected to by plaintiff, or in refusing certain evidence offered by plaintiff and objected to by defendant? (Assignments of Error 3 to 27, inclusive. See pages 20-37 hereof.)

3. Did the trial Court err in instructing the jury as set forth in Assignments of Error 28 to 31, inclusive? (See pages 38-40 hereof.)

4. Did the trial Court err in refusing to direct the jury to return a verdict for the plaintiff on the 8th cause of action? (Assignment of Error 32. See page 40 hereof.)

5. Did the trial Court err in refusing to instruct the jury, as requested by the Government, and set forth in its Assignments of Error 36 to 42? (See pages 41-43 hereof.)

6. Did the trial Court err in instructing the jury, as requested by the defendant, and set forth in Assignments of Error 43 and 44? (See pages 44-45 hereof.)

7. Did the trial Court err in refusing to direct the jury to return a verdict for the plaintiff on the eighteenth cause of action? (Assignment of Error 33. See page 40 hereof.)

8. Did the trial Court err in directing a verdict for the defendant on the eighteenth cause of action and in refusing to submit same to the jury? (Assignments of Error 34 and 35. See page 41 hereof.)

The above questions are properly grouped and discussed on the pages referred to, and for that reason it is deemed unnecessary to set them out here in detail.

THE ACTS AND ORDERS OF THE INTERSTATE COMMERCE COMMISSION.

An Act To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers, and for other purposes.

[Sections 2 and 4, Act of March 2, 1893 (27 Stat. at L. 531), as amended by Act of April 1, 1896 (29 Stat. at L. 85).]

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. (Counts 2, 3, 15, and 16.)

SEC. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to

men in coupling and uncoupling cars. (See Order of Commission, pages 51-52 hereof.) (Counts 1, 7, 9, 11, and 13.)

Section 1 of the Act of March 2, 1903 (32 Stat. at L. 943) extended the provisions of the earlier Acts to apply to cars used on any railroad engaged in interstate commerce.

Supplementary Act of April 14, 1910 (36 Stat. at L. 298):

SEC. 2. That on and after July first, nineteen hundred and eleven, it shall be unlawful for any common carrier subject to the provisions of this Act to haul, or permit to be hauled or used on its line, any car subject to provisions of this Act not equipped with appliances provided for in this Act, to wit: All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards; * * * (See Orders of Commission, pages 51-52 hereof.) (Counts 4, 5, 6, 8, 10, 12, 14, and 17.)

SEC. 3. That within six months from the passage of this Act the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location, and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second, eighteen hundred and ninety-three; * * * and thereafter said number, location, dimensions, and manner of application as designated by said Commission

shall remain as the standard of equipment to be used on all cars subject to the provisions of this Act, unless changed by an order of said Interstate Commerce Commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the Interstate Commerce Commission shall be subject to a like penalty as failure to comply with any requirement of this Act: *Provided*, That the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act. Said Commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory * * * and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign commerce which does not comply with the standard so prescribed by the Commission. (See Orders of Commission, pages 51-52 hereof.) (Counts 1, 7, 9, 10, 11, 13, 14, and 18.)

SEC. 4. * * * *Provided*, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the

place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired without liability for the penalties imposed by section four of this Act or section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first, eighteen hundred and ninety-six, if such movement is necessary to make such repairs and such repairs can not be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains, or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight.

ORDERS OF INTERSTATE COMMERCE COMMISSION.

It is unnecessary to set out in full the standards of equipment prescribed by the Order of the Commission of March 13, 1911; but the substance of this Order, in so far as it relates to the instant case, provides that cars shall be equipped as follows:

END HANDHOLDS ON FLAT CARS (counts 1 and 13):

Number required: Four (4).

Dimensions: Minimum clearance, two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: Horizontal—One (1) near each side of each end of car on face of end sill.

SIDE HANDHOLDS ON FLAT CARS (counts 7, 9, and 11):

Number required: Four (4).

Dimensions: Same as end handholds.

Location: Horizontal—One (1) on face of each side sill near each end.

SIDE LADDERS ON HIGH SIDE GONDOLAS (count 10):

Number required: Two (2).

Maximum spacing between ladder treads: Nineteen (19) inches.

Minimum clearance of ladder treads: Two (2), preferably two and one-half ($2\frac{1}{2}$), inches.

Location: One (1) on each side, not more than eight (8) inches from right end of car.

SILL STEPS ON FLAT CARS (count 14):

Number required: Four (4).

Dimensions: Minimum length of tread, ten (10), preferably twelve (12), inches.

Location: One (1) near each end on each side of car.

Tread shall not be more than twenty-four (24), preferably not more than twenty-two (22), inches above the top of rail.

The Order of the Commission of October 10, 1910, in re Standard Heights of Drawbars, involved in the 18th cause of action, provides that—

the standard height of drawbars heretofore designated in compliance with law is hereby modified and changed in the manner hereinafter prescribed, to wit: The maximum

height of drawbars for freight cars measured perpendicularly from the level of the tops of rails to the center of drawbars for standard-gauge railroads in the United States subject to said Act shall be $34\frac{1}{2}$ inches, and the minimum height of drawbars for freight cars on such standard-gauge railroads measured in the same manner shall be $31\frac{1}{2}$ inches. (Count 18.)

This Order became effective December 31, 1910.

ARGUMENT.

QUESTION INVOLVED—No. 1.

ASSIGNMENTS OF ERROR 1 AND 2.

In order to bring itself within the Proviso of the Safety Appliance Act, a carrier must show, and therefore plead, among other things—

(a) *That the car became defective while being used by it upon its line of railroad.*

(b) *That it could not be repaired at the point where its defective condition was first discovered.*

(c) *That it was only hauled from the point of discovery to the nearest available point where it could be repaired.*

(d) *That such movement was necessary to make such repairs.*

It is well settled that the purpose of a Proviso, ordinarily, is to restrain or modify the enacting clause of a statute.

United States v. Dickson, 15 Pet. 141.

Schlemmer v. B. R. & P., 205 U. S. 1.

Excuses embodied in the Proviso are separate and affirmative defenses.

C., B. & Q. v. United States, 8th C. C. A.;
195 Fed. 195.

These excuses must be particularly pleaded; and the burden is on the defendant to sustain such allegations.

United States v. K. C. S., 8th C. C. A.; 202
Fed. 828.

United States v. T. & B. V., 5th C. C. A.;
211 Fed. 448.

There is every good reason for such a rule; for, just as the plaintiff is required to show, or allege in its declaration, the actual movement complained of, as well as the number and initials of the car and its defects, in order that defendant may know what it is charged with and what it has to meet, so should the defendant be required to plead with particularity those things peculiarly within its knowledge—that is, the place of discovery of a defect, the place of repair, the availability of the latter to the former, and the necessity for such movement. Only in this way can the Government be acquainted with what it has to meet.

If, in the instant case, there was a real, bona fide intention on the part of the defendant to bring itself within the Proviso, it should have done so. It can hardly be suggested, much less urged, that, because of a lack of knowledge, it would be a hardship on the defendant *in the instant case* to frame its answer with such definiteness and particularity, for the record dis-

closes the fact that all train crews were, by rule, required to inspect their trains at every opportunity, even when taking coal or water or waiting for other trains, and make a record of cars found defective (Rec. 238), and that this rule was enforced and not winked at (Rec. 274).

Defendant can not well plead ignorance of the law in this respect, for this Court, on March 12, 1923, in a decision in case No. 3909, *United States v. Northern Pacific Railway*, 287 Fed. 783, so construed the Proviso in question as to leave no doubt on this question.

As in that case (No. 3909), so in this case, the defendant has not "conformed to the mandate of the Proviso."

And, without taking up any unnecessary time, we desire very briefly to call the Court's attention to the fact that there is another reason why plaintiff's demurrer should have been sustained or the motion granted to strike from the answer the so-called affirmative defense.

An affirmative defense can not be pleaded *unless the car was actually defective, its defective condition actually discovered, and its movement being for the express purpose of remedying such defects*. But how can such conditions exist if a car, as a matter of fact, is not defective? In its general denial the defendant pleaded that each car was not defective; then in its so-called affirmative defense it attempted to plead that the cars were defective and were being

hauled for repair. These defenses are too inconsistent to warrant further discussion.

As was said in the case of *State National Bank v. Carter*, 13 Wash. 281; 48 L. R. A. 177:

And even in those States allowing inconsistent defenses to be pleaded, it is doubtful whether a defendant would be allowed to plead and rely on two defenses so *inconsistent that if one is true the other must be false*. (Italics ours.)

For the reasons above stated, the Court should have sustained plaintiff's demurrer to defendant's affirmative defense and granted the motion of plaintiff to strike same from the answer.

QUESTIONS INVOLVED—No. 2.

ASSIGNMENTS OF ERROR 3 TO 27.

This question relates to the admissibility of immaterial testimony and the rejection of certain relevant testimony.

Owing to the importance of the several questions raised in connection therewith, and the many errors which the Government believes are disclosed by the Record, the Assignments of Error will be discussed either separately or grouped, according to the subject matter, when this can be conveniently done.

(a) *The Government is not required to report to railway officials the condition of equipment found on their line, and it was error to require a witness, under the circumstances shown by the Record in this case, to answer a question of such character— (Rec. 79).*

1st. *Because the law imposes upon a carrier the duty of inspecting and repairing its own cars.*

2d. *Because it opens the door to irrelevant arguments, and unless explained or qualified, might becloud the issues and mislead the jury.*

(ASSIGNMENTS OF ERROR 3 AND 4.)

For many years carriers have attempted to defeat prosecutions of this kind on the ground that the violations must be willful and deliberate; in other words, they have contended that before the Government can successfully proceed with such a case, it must first notify the carrier that certain defective equipment is in its yards, and then observe that carrier deliberately disregarded such knowledge and haul the car away in such condition.

But the Courts have uniformly rejected such impossible construction of the Act.

N. & W. v. United States, 4th C. C. A.;
191 Fed. 302.

C. B. & Q. v. United States, 8th C. C. A.;
211 Fed. 12.

C. & O. v. United States, 6th C. C. A.;
249 Fed. 805.

Now, the purpose of the question asked the witness Winter (Rec. 79; Assignment of Error 3) is plainly apparent, especially when the Court notes the unwillingness of the defendant to allow the witness to explain to the jury his reasons for not notifying defendant's officials of these particular cars, for an objection was interposed to such question (Rec. 116).

This objection was overruled, and the witness replied (Rec. 116):

Well, a good many times, as in this case, we find that it does not do any good.

It is true that the Court charged the jury that the Government Inspectors were not required to notify railroad officials of equipment they had found defective (Rec. 300); but the question of possible unfairness of the witness having been injected into the case by defendant, and over the Government's objections, the Court should have permitted the witness Winter to show that he had been more than fair, for note the offer of proof (Rec. 117) in connection with the question forming the basis of Assignment of Error 4:

Mr. LIST. I offer to prove by this witness that on August 31 he reported to one of the officials of the Northern Pacific of having inspected about two hundred cars and having found approximately fifty of them in a defective condition; and that he gave to the Northern Pacific official the record showing the individual numbers of those cars defective.

This was a sufficient preliminary question for the subject matter intended.

And, further, on this question of fairness, which it is requested will be considered in connection with this phase of the case, the Court's attention is called to subdivision (b) page 59 hereof.

The Court erred in requiring the witness Winter to answer the question relative to his failure to notify

defendant's officials of the particular cars in the instant case.

But, after requiring such question to be answered, and after it became apparent that the question of the witness's fairness had been injected into the case by defendant, the Court further erred in not permitting the Government to show that the witness had been fair (Rec. 118).

(b) *The Court erred in refusing to permit the witness Winter to testify to certain facts for the purpose of showing that he had been more than fair with the defendant, which questions to that end were only asked the witness after his veracity and fairness had been injected into the case by defendant* (Rec. 118).

(ASSIGNMENTS OF ERROR 5 AND 6.)

A perusal of the Record will show that the carrier's defense in this case, aside from camouflaging the issues, was to attack the veracity and fairness of the Government Inspectors for doing their duty.

This attitude was shown early in the cross-examination of the witness Winter, for we find the following reply to a question asked by counsel for the defendant (Rec. 77):

We tried the brake when we inspected the car and noticed the condition of the car. And when it left in the train at 9.50 it was in the same condition.

And immediately the defendant showed part of its intended defense, as will be seen by this remark of counsel to the witness (Rec. 77):

Of course, you understand that in order to get a conviction you have to testify to that.

Then, further, as part of its plan of trying the case on irrelevant issues, we find the following questions asked the witness Winter (Rec. 77, 78):

Mr. WINDERS. At that time there were some of these trainmen—I don't say all, or the majority of them—but a few of the trainmen working for the Northern Pacific and the other railroad companies that were not out on strike that were quite active in trying to help the strikers out?

(Government's objection overruled.)

Mr. WINDERS (continuing). There was a stray man or two that was not any too loyal to the railroad?

WITNESS. I would say generally——

Mr. WINDERS. I didn't say generally. I have a great deal of pride in the employees of the Northern Pacific; but I say there were a few stray ones that were not very loyal, that were trying to help make things as miserable as they could in the operation of these yards; isn't that true?

(Government's objection sustained.)

Mr. WINDERS. Is it not a fact, Mr. Winter, that there were continually tales being carried to you and to Mr. Weeks (the other Government inspector) from men who were drawing salaries from the Northern Pacific and from other corporations, complaining about the equipment?

WITNESS. Yes, sir.

Mr. WINDERS. Did any of these men tell you—referring to this fifth cause of action—that this particular brake staff was bent?

WITNESS. No, sir.

Following this, all through the cross-examination of the witness Winter were references in questions of counsel relative to the “strike period.”

The above line of questioning, particularly the last question, is very significant in connection with defendant’s desire to try the case on sympathetic, prejudicial testimony, wholly immaterial and irrelevant; *for the Record clearly discloses the fact that defendant claimed that it had inspected this car (fifth cause of action) and that it was not defective when it left Auburn.* (Rec. 249, 250).

And after all this the Government was refused the right to show that the witness had been very, very fair, for objections to the following questions were sustained (Rec. 118; Assignments of Error 5 and 6):

Mr. LIST. It has been suggested here that there was a strike on and at that time your conduct in reporting these cases for prosecution was not in a spirit of fairness. The strike went into effect in July, I believe. How long was it after that before you reported any cases against the Northern Pacific for prosecution?

(Objection by defendant sustained.)

Mr. LIST. Mr. Winter, Mr. Winders asked you if it was not true that to your knowledge some of the men were not loyal to the Northern Pacific and pointed out defects to you upon

which you based your prosecution. I am going to ask you to state whether or not it is true that the employees of the Northern Pacific did not accuse you of being too fair to the Northern Pacific?

(Objection by defendant sustained.)

As a matter of fact, the witness *Weeks* was so fair to defendant that he reported no case for prosecution after the strike went into effect until August 31st (Rec. 145), and it was intended to show that the witness *Winter* was equally as fair.

These questions were perfectly proper, as they would have developed certain things the jury had a right to consider on the question of fairness, for it had been misled by the questions of counsel, and it had a right to judge the conduct of a witness by *his actions and not by counsel's suggestions*.

(c) The Court erred in overruling plaintiff's objections to certain questions asked the witness Weeks, none of which was relevant to any real, bona fide issue in the case, but injected therein for the sole purpose of opening the door to irrelevant arguments. (Rec. 161, 163, 172.)

(ASSIGNMENTS OF ERROR 7, 8, AND 9.)

It is unnecessary to discuss these Assignments of Error on the question of the fairness of the witness *Weeks* in reporting cases for prosecution during the strike in the summer of 1922. It is sufficient to say that evidence of a general condition or situation, to be in the least relevant, must have some connection with the specific acts complained of. But in the instant case it did not, for defendant claimed that

none of the cars involved in the first seventeen causes of action left Auburn or Centralia with penalty defects; and as to the eighteenth cause of action, it was not denied that defendant received a car from the Great Northern Railroad in the condition complained of.

But these questions raised by Assignments of Error 7, 8, and 9 will be more fully discussed in subdivision (d) page 63 hereof, relative to the admissibility of the large amount of "strike" testimony.

In connection with this question of the fairness of the two Government witnesses, it should be finally noted that the Court charged the jury to the effect that a strike "tends to array men on the two sides of the question;" that "they have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation;" and that "a bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized" (Rec. 299; Assignment of Error 29). The proceedings immediately following the taking of the exception to this part of the charge shows that it had reference to the witnesses, the two Government Inspectors, who had been denied the right to let the jury judge their sympathy and fairness by their actions. But the defendant's witness had every opportunity to testify to their actions in detail.

(d) *Evidence of the strike, and acts growing out thereof or in connection therewith were all irrele-*

vant and immaterial, and did not tend to support any of the issues in the case, and for the following reasons:

1st. *There was no causal connection between the strike and the movement of any defective car.*

2d. *It tended to mislead both the Court and the jury.*

3d. *It had a tendency to affect the verdict of the jury.*

(ASSIGNMENTS OF ERROR 7 TO 9 AND 13 TO 26.)

This was substantially the rule with respect to prejudicial testimony laid down in the case of *Matteson v. Sou. Pac. Co.*, 92 Pac. 101, and cases cited therein.

All the evidence about the strike related to *conditions in general*, to the situation at Auburn, Centralia, and Seattle, *and to other places not involved in this case.*

We do not want to be guilty of too much repetition, but in order to impress upon the Court the immateriality and irrelevancy of this "strike" testimony, we feel the necessity of again pointing out these pertinent facts:

Of the cars hauled from Auburn and Centralia not a single one was admitted to be defective in the respect complained of by the Government; in fact, it was claimed that each and every one was in good order.

Only as to one cause of action (8th) did the defendant claim that a car had a defect of any kind; and as to this, it was claimed that it was going to Renton for general repairs, "together with twenty-three or twenty-four others just like it." (Rec. 224.) And these damaged cars were switched into

a commercial train at a division terminal, Auburn, the morning of August 31st, and hauled to Renton. (Rec. 69; Ex. A2.) In this same commercial train were twenty-nine cars loaded with logs. (Ex. A2.) Thus combined together and hauled over the main line, this train of 77 cars—commercial cars in good order, 23 or 24 damaged cars, and 29 cars of logs—did not indicate that defendant was doing all that it reasonably could in the interest of safety; and this dangerous practice was not shown to be necessitated by the strike.

But to clarify the situation a little more with respect to the 8th cause of action, N. P. flat car 67105:

Neither of the witnesses for defendant, Crosby or McCullough, ever saw this car (Rec. 208, 220); but considering the defects or damages to the car, other than the missing brake wheel, which could have been replaced at Auburn, Crosby testified, in effect, that on *August 31st* they operated train No. 930 from Auburn, in which were a large number of logging cars going to Renton for repair; that they did not then have available men *at Auburn* to repair these cars; and that in his judgment such movement was necessary (Rec. 199).

But this should be noted: Crosby testified that during the strike cars were being sent from Auburn and Centralia to South Tacoma for repair (Rec. 209). Now, the N. P. flat car 67105 (8th count) *came from Tacoma (or South Tacoma) in a damaged condition*, for McCullough testified (Rec. 224) that this car arrived

in Tacoma *July 29th*, was unloaded and found in bad order (but no specific defects were shown by the witness); it was than held out of service until the night of *August 30th*, when, along with other bad order cars, it was moved to Auburn, and the following morning was hauled to Renton in train No. 930.

Now, *it may be true*, that if it was necessary to haul this car *from Auburn* for general repairs, Renton may have been the nearest available point *from Auburn*, as testified to by Crosby (Rec. 199), and as plainly evident from McCullough's testimony (Rec. 226). But the movement for repairs permitted by the Proviso is not, as suggested by defendant's character of testimony, "from the place where such equipment was first discovered to be defective" *by the Government inspectors, but has reference to the place where defendant first had knowledge of a car's defective condition*. That the Court was either misled by this assumption of defendant, or else concurred in such construction of the Proviso, is evident from its charge to the jury with respect to this 8th cause of action (Rec. 317; Assignment of Error 43), wherein it was said, in part:

It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton. * * * I do not mean that you must find that is was impossible to repair this car at Auburn, but if you believe that the only practicable method,

under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired, and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, * * * your verdict should be for the defendant on this cause of action.

This part of the Court's charge to the jury was substantially defendant's Requested Instruction 8 (Rec. 316), *and it should be particularly noted that Tacoma, or South Tacoma, where the car was found in bad condition over a month prior to the time it was hauled from Auburn, was not mentioned.*

We have thought it advisable to refer to this 8th cause of action somewhat in detail, for we want this Court to see just to what extent were camouflaged the issues in this case, and how the great mass of irrelevant, immaterial testimony relative to the strike had a strong tendency to mislead the Court and jury.

The greater part of this testimony relative to the strike has been set forth in the various Assignments of Error, and it is not our purpose to refer to these in detail, for we believe it is sufficient merely to summarize, without detailed duplication, this mass of testimony. This summary includes evidence relative—

Unusual burden at Centralia.

Acts of strikers or sympathizers in cutting air hose or knocking off grab irons after a train was made up at Auburn and Centralia.

Acts of strikers or sympathizers in cutting air hose, damaging angle cocks, and otherwise rendering equipment defective at Tacoma and Ellensburg, as well as Auburn and Centralia.

Act of cutting 22 air hose in one train.

Air hose being filled with waste; also steam hose.

Necessity for setting refrigerator cars on steam tracks to keep them from being filled up with waste.

Question of endurance so far as company concerned.

Everybody working constitutional limit.

Every nerve strained.

Insufficiency of men at Auburn to repair log cars hauled from there in train 930, which cars were not involved in this case.

Reasons of Northern Pacific for not employing new men until about July 18th.

Danger of repairing cars on transfer or interchange track in Seattle (18th count).

Train crews trying to bluff officials about cars being defective, and being particular about taking out trains with defects.

Condition of car 67105 (8th count) when it left *Auburn*.

Efforts to employ men at Auburn.

Unreasonableness of making repairs on transfer or interchange track in Seattle (18th count).

Critical attitude of trainmen, and acts of brakemen in crawling under trains to find defects.

Interference from outsiders; and great deal of interference from people in employ of defendant.

Intention of trainmen to delay trains.

Other Brotherhoods doing everything to help strikers.

Malicious acts of unknown persons, in disconnecting uncoupling levers, pulling apart or cutting air hose, in bending off stirrups (sill steps), and opening angle cocks to prevent getting full air pressure, and in doing other acts of sabotage.

Treatment of officials by train crews.

Critical condition at Centralia.

Inability to get men at Centralia account reputation of I. W. W. center.

It will thus be seen that this mass of "strike" testimony, with all its ramifications and angles, was wholly irrelevant; it had no connection with the *Centralia* cases, for the five cars hauled from there, defendant contended, were not defective. It had no bearing on the *Auburn* cases, for in 11 of those 12 counts, defendant also contended that the cars were not defective in any respect; and in the remaining count, the 8th, defendant's contention was that the car did not have a brake wheel missing, the defect complained of by the Government, but that it had other defects which defendant claimed had to be repaired at *Renton*, the nearest available repair point from

Auburn, although the evidence was undisputed that this car was discovered to be defective at Tacoma or South Tacoma, over one month before it was hauled from there to Auburn, and then later from Auburn in a commercial train.

It is plainly evident that the Court erred in admitting such irrelevant testimony.

(e) Where the defendant introduced evidence to show, not merely that a car was not defective in the respect complained of by the Government (13th count; end handhold fouled by logs), but that this class of cars were so constructed that it was impossible for them to be so loaded with logs as to foul the handholds, it was proper rebuttal evidence for the Government to show: (Rec. 187, 193, 194, 292.)

1st. That defects of this kind had frequently occurred in the past and that reports of same had been furnished defendant's Car Foreman and Inspector of Equipment, two different individuals.

2d. That one morning during the progress of this trial, Government inspectors had found in the Northern Pacific yards similar cars so constructed and loaded that the handholds could be fouled by the lading (logs).

(ASSIGNMENTS OF ERROR 10, 11, 12, AND 27.)

This evidence was clearly admissible. For instance, take the defendant's position with respect to this 13th cause of action. It claimed that the car was not defective; then it introduced "strike" testimony, having no causal connection with its defense that the car was not defective or that it was so

constructed that it could not have its handholds fouled. Therefore, it was proper for the Government to show in rebuttal that prior to the strike similar cars, so constructed that their handholds could be fouled, were operated on defendant's line, and this fact was brought home to defendant's officials. This testimony offered in rebuttal had a threefold purpose: First, it would show that the strike had nothing to do with this character of defect; second, such conditions having existed long prior to the strike, it would have a further tendency to rebut the suggestion that the Government inspectors had been unfair to defendant for reporting cases for prosecution that arose by reason of, or grew out of, this strike; third, it was in rebuttal of defendant's evidence that such cars were so constructed that they could not have their handholds fouled by logs, a defense which the Government was not required to anticipate in its case in chief and which was not disclosed by the pleadings.

For the reasons stated, the Government contends that the Court erred in not permitting it to introduce the testimony set forth in Assignments of Error 10, 11, 12, and 27.

QUESTIONS INVOLVED—No. 3.

ASSIGNMENTS OF ERROR 28 TO 31.

This involves certain instructions given the jury all growing out of the "strike" testimony, and while they are somewhat similar in that respect, it is deemed

advisable to discuss each Assignment separately, for in that way the Court can better appreciate the errors committed and the Government's position.

(a) *It was error for the Court to charge the jury that it might take the "strike in account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective."* (Rec. 298.)

(ASSIGNMENT OF ERROR 28.)

It is unnecessary here to set forth the whole charge of the Court embodied in this Assignment of Error; it is sufficient to say that in connection with the part quoted above, the Court suggested to the jury that "it might be concluded, if the evidence was sufficient, that they [Auburn and Centralia] had ceased to be available repair points."

But this whole charge was wrong; it was not justified by the slightest evidence, for no car was hauled from Centralia for the purpose of making any kind of a repair, and the evidence of defendant's witnesses, in substance, was: "We inspected the cars ourselves; we did just as good work as the regular inspectors, for none of the cars involved left Centralia in a defective condition." That is all there was to the *Centralia* cases, and the Court's reference to same in this part of its charge was wholly irrelevant and misleading to the jury.

And the same situation existed with respect to the work of the officials at Auburn; for in no single instance, not even as to the 8th count, did any witness claim or suggest that any car had to be, or was, hauled from Auburn, as charged by the Court, "*for the purpose of making the repairs in the matters that are claimed to have been defective.*" (Rec. 298.)

If the Court thought it advisable for the jury to consider the movement of N. P. car 67105 (8th count) for the purpose of repairing defects defendant showed it had discovered at Tacoma, or South Tacoma, over a month before, it could readily have done so only in a general way, for the Record is significantly silent as to what these needed repairs were; but it was evidently the theory of the Court, as heretofore pointed out, unless inadvertently misled by defendant's shifting position, that the movement permitted by the Proviso was from the point where a car was discovered to be defective by the Government. Of course, this would naturally infer that the defendant itself had discovered the defect (but not necessarily at the same place), for otherwise there could not be present the intent or purpose to haul the car for repairs.

It is evident that this part of the Court's charge was wholly wrong; it was not based upon facts, or even suggestion, so far as Centralia and "matters that are claimed to have been defective" are concerned.

But for further discussion of this 8th count from another angle, the attention of the Court is directed

to Questions Involved—No. 4: Assignment of Error 32, beginning at page 77 hereof.

(b) *It was error for the Court to charge the jury that "a strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused it can affect their judgment and can affect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. It works both ways."* (Rec. 299.)

(ASSIGNMENT OF ERROR 29.)

The proposition thus advanced by the Court can not be denied when, or if, aimed at certain individuals, provided there is some evidence to justify such allusion. There were but two classes of persons that could be covered by this statement, or charge, of the Court; these were the Government inspectors and the defendant's witnesses. (Rec. 299.) The latter were given every opportunity, *both by the Court and plaintiff*, to show their fairness, and at no time did the plaintiff suggest by its method of questioning, or the use of innuendoes, that the sympathy of defendant's witnesses for the defendant affected their testimony. But this is not true with respect to the Government inspectors, for their fairness and veracity were continually assailed by defendant, and plaintiff was denied the right to show the actions and conduct of these inspectors in order that the jury might have

every opportunity to judge their sympathy, fairness, and veracity, just as it had of judging the sympathy and fairness of defendant's witnesses. (The word "veracity" is purposely omitted from this last clause, for we disclaim all intention of even suggesting that any of defendant's witnesses made any false statement.) This question of fairness, which is naturally akin to sympathy, has been discussed in Questions Involved—No. 2, subdivisions (b) and (c), pages 59, 62 hereof.

Therefore, this charge of the Court relative to sympathy of the witnesses, and its effect upon the weight to be given their testimony, was erroneous. It subserved no good purpose; but, instead, *it emphasized the comparison between the fairness of witnesses, who, unhampered and unfettered, were allowed to tell their plain, straightforward story, and those other witnesses, the Government inspectors, who were not so fortunate.*

This charge of the Court was also erroneous, because it suggested sympathy.

(c) *It was error for the Court to charge the jury to the effect that if, after defendant had inspected cars, mischievous individuals rendered them defective, and the company did not discover them until they got out on the line, the defendant would not be liable.* (Rec. 308).

(ASSIGNMENT OF ERROR 30.)

(d) *It was also error for the Court to charge the jury to the effect that if defendant inspected a train within a reasonable time before its departure the train should*

be considered as upon the line, and defendant would not become liable if it exercised a high degree of care until it discovered the defects, when it would again be its duty to repair the car wherever found, if it could be repaired there; if not, then to take it to the nearest available point to remedy the defects. (Rec. 309.)

(ASSIGNMENT OF ERROR 31.)

These instructions show to what extent the "strike" testimony misled the Court, and undoubtedly the jury; for there was not the least bit of evidence upon which to base such a charge as either of the above.

There was some general, prejudicial testimony admitted over the objections of the Government that might have formed a basis (not necessarily legal) for either of such charges *had it related to any particular cause of action, but which it did not.*

In no single instance was it even suggested that a mischievous individual rendered any of the 18 cars defective, nor was it shown, or attempted to be shown, in any case that a car was inspected "within a reasonable time before its departure," *and that thereafter it became defective.*

But in the *Auburn* and *Centralia* cases it was testified that no car left either place with the defects complained of; and that as to some defects to the car involved in the 8th count, they were found over a month before the car arrived in Auburn.

In view of the fact that there was no basis for either of the above charges, it is unnecessary to discuss the law as embodied therein.

Therefore, both of these charges were erroneously given, not only because of the lack of some evidence to support them but because, along with the "strike" testimony, they had a tendency to mislead the jury.

QUESTIONS INVOLVED—No. 4.

ASSIGNMENT OF ERROR 32.

The Court erred in refusing to direct a verdict for the plaintiff on the 8th cause of action, the one involving the car hauled out of Auburn with a hand brake wheel missing. (Rec. 313.)

This request for a directed verdict was very properly refused *if* we are to give any consideration to the testimony of two of defendant's witnesses to the effect the brake wheel was not missing when the car left Auburn. (Rec. 250, 260.) And we can not ignore such testimony even if it was of a negative character. On that theory nothing remains to be said. It simply resolved itself into a question of whether the jury should give greater weight to the positive testimony of the Government inspectors or to the negative testimony of defendant's witnesses. And, therefore, with that count in the same situation as the remaining counts involving cars hauled from Auburn and Centralia, the Court erred in not instructing the jury as requested by plaintiff in its requests Nos. 5 [3], 8, and 9. See question immediately following, subdivisions (a), (b), and (c).

QUESTIONS INVOLVED—No. 5.

ASSIGNMENTS OF ERROR 36 TO 42.

(a) *It was error for the Court to refuse to charge the jury as follows, the same being plaintiff's Request for Instructions No. 5 [3] (Rec. 314):*

If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn or Centralia in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

(ASSIGNMENT OF ERROR 36.)

The Court read plaintiff's Request No. 5 [3] to the jury, as above set forth, but qualified it by adding thereto the following (Rec. 300):

** * * unless moved for the purpose of being repaired, as I have explained to you.*

Now, plaintiff's request related to cars with defects "alleged in the Government's complaint," none of which, as claimed by defendant, were defective, and therefore were not being hauled for repair. So, the Court's qualification of this Request, *suggesting a necessary movement*, was not justified by the facts.

(b) *It was error for the Court to refuse to charge the jury as requested by plaintiff in its Request for Instructions No. 8, as follows (Rec. 314):*

It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case.

(ASSIGNMENT OF ERROR 37.)

The effect of this instruction was destroyed by the Court, for while the same was read as requested, the Court qualified same by saying (Rec. 300):

Yet you may consider what the evidence has shown in that respect in determining the nearest available repair point.

The Government's request should have been granted, for it was justified by the evidence, whereas the qualification thereof by the Court was not based on any evidence.

It may have been true that defendant had some trouble in getting the most competent men to inspect and repair cars, for it made no effort to do so until nearly three weeks after the strike went into effect; but that had no bearing on the instant case. As to the cars involved, the evidence of defendant's officials was to the effect that they worked long hours, strained every nerve, and actually inspected and repaired the safety appliances on these cars, if they were defective, before the cars left Auburn or Centralia. (Note Questions Involved—No. 6 (b); Assignment of Error 44, capitalized part, page 96 hereof.) This testimony related to all cars leaving those places, excepting the one involved in the 8th count, the one with a missing brake wheel; and as to that, defendant did not seem to know just what position to take, for one witness, Crosby, testified that they would make even a temporary repair to a car that was going to Renton (Rec. 210), but another witness did not seem to be so sure of that (Rec. 263).

But notwithstanding the fact that there was no evidence even suggesting that a brake wheel could not be applied at Auburn, or that the car was being hauled to the nearest available repair point from Tacoma, or South Tacoma, or that it could not be repaired at Tacoma or South Tacoma where it was found defective one month before, the Court's qualification of this request had the effect of a suggestion to the jury that there was evidence of such character, and it therefore had a tendency to mislead the jury.

With respect to this 8th count, there was not the slightest evidence to suggest "that the movement of the car complained of by the Government was necessary in order that the repair could be made, nor that the repair could not, consistently with a proper operation of defendant's railway even, have been made at the point where the defect was *originally discovered*." (Italics ours.) The quoted part is taken from opinion of Judge Bledsoe in the case of *United States v. A. T. & S. F.*, 220 Fed. 215.

At this point it might be well to consider together three Requests for Instructions made by plaintiff, which the Court refused to give, the same being Nos. 12, 14, and 15.

(c) *It was error for the Court to refuse to give the jury the following instructions, as requested by plaintiff (Rec. 314-316):*

No. 12. *In order to comply with the spirit of the law, the defendant can not establish a*

division terminal and make up trains at such terminal and haul in such trains cars with defective safety appliances, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repair men at Auburn or Centralia hauled any of the cars from these points in road service in the condition complained of by the Government.

(ASSIGNMENT OF ERROR 39.)

No. 14. The jury must not return a verdict for the defendant on any cause of action, unless it appears that the defective cars were hauled by themselves for repair, or hauled in what is known as a hospital train. Good order and bad order cars can not be assembled together in a train and hauled from a terminal, some for repair and some in commercial service. And the burden is on the defendant to show that this was not done.

(ASSIGNMENT OF ERROR 41.)

No. 15. The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, can not be considered as an excuse for not repairing the defective equipment in question.

(ASSIGNMENT OF ERROR 42.)

The Court read to the jury plaintiff's Request No. 12, but qualified it by adding (Rec. 302):

Notice the words "in road service." They would have a right, if they could not be repaired there and it was necessary to move them in

order to secure the repairs, to haul them to the nearest available repair point, because they would not be in road service.

Plaintiff's Request No. 14 was not given in any form, but Request No. 15 was read to the jury, qualified as follows (Rec. 302):

** * * provided you find it could have been repaired at Auburn or Centralia.*

In the application of these Requests to the instant case let us look at train No. 930, which left Auburn with 77 cars. Twenty-nine of these cars were loaded with logs; 23 or 24 of them were in bad order and had been brought from Tacoma or South Tacoma to be hauled in this train, or at least in some train; eight of them had penalty defects, according to the Government's testimony, one of which was also defective in other respects and so admitted by defendant. This car was the one with the brake wheel missing.

It can not be denied that this was a dangerous practice; and while we do not know to what extent these 23 or 24 other cars were defective, the witness McCullough testified (Rec. 224) that they were going to Renton for general repairs, just like N. P. car 67105, which was the one with the missing brake wheel and some other defects not disclosed by the Record; therefore, we may assume, for sake of argument, that they also were seriously defective, as the witness Weeks testified with respect to all the cars involved, and without contradiction (Rec. 144). But aside from that, the movement of any defective car that requires general repairs in a good order com-

mercial train can not be said "to promote the safety of employees and travelers."

Then to add to the questionable operation of this train, defendant also put in it 29 cars loaded with logs, which character of lading defendant's mechanical superintendent testified might shift before the car was moved 10 feet. (Rec. 287.)

While it is not a violation of law to commingle ordinary commercial cars with logging cars if the safety appliances are in good condition, yet from a safety first standpoint, like the inclusion of the cars that required general repairs, such practice can have no tendency "to promote the safety of employees and travelers."

But it is evident that the trial Court was of the opinion that *any manner of movement* of a defective car for repair was permissible, for no other conclusion can be reached when the charge to the jury is read and the instructions requested by plaintiff, but denied, are reviewed.

Just briefly, let us see what little law there is on this question:

When the Proviso of the 1910 Act was being framed the Senate Committee on Interstate Commerce, on February 18, 1910, submitted its Report (No. 250, 61st Congress, 2d Session); and in this Report, accompanying House Bill 5702, we find the following, at pages 3 and 4:

As there is danger in the movement of such defective cars, and as trainmen are obliged

to handle them without any real option on their part so to do, it is but just and equitable that the risk attendant upon such movement where death or injury to trainmen results should be borne by the carrier and not in any degree assumed by the trainmen.

It is one of the perils of the operation of the railroad for which trainmen are not at all responsible. As it is practically obligatory upon the trainmen to incur such dangers, there should be no impairment of any right of such trainmen by reason of the performance of such dangerous duty * * *.

** * * This amendment does not permit the movement of damaged cars in connection with those commercially used, and in every other respect the interests of the employees have been fully safeguarded.*

When the Senate Conference Report was made on April 4, 1910 (Report No. 932, to accompany H. R. Bill 5702), nothing was said along this line, but there had been incorporated into the Proviso, as agreed upon, that which the Government, in its endeavor to promote safety, construes to mean that damaged or defective cars must be excluded from use in connection with commercial cars.

The Proviso in question is set forth in full on page 50 hereof, and incorporated therein will be noted a sub-Proviso, which reads:

and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are

commercially used, unless such defective cars contain live stock or "perishable" freight.

But there are two things in the Proviso in chief to which we desire to call particular attention; these provide that—

*such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired * * ** IF SUCH MOVEMENT IS NECESSARY TO MAKE SUCH REPAIRS and such repairs can not be made except at such repair point. (Italics and capitals ours.)

Now, in order to comply with the law it is necessary for a carrier to repair its cars; but, of course, we realize that repair points for heavy repairs can not be carried around on wheels; and, therefore, at times a carrier must haul a car "to the nearest available point where such car can be repaired" in order to have it put in a safe, serviceable condition, *which, in itself, would be a necessary movement.* Therefore, we may ask: Was the phrase capitalized above inserted without due regard to its meaning, simply as a matter of reiteration or emphasis, or was it incorporated in the Proviso with some other object in view?

We can not escape the conviction that the phrase "if such movement is necessary to make such repairs" was intended to have a well-defined, safety-first meaning, and that it relates to the *manner of movement* under the circumstances in

each case, rather than *any* character of movement. Therefore, applying such construction to the 8th cause of action, it would mean that the car with the missing brake wheel, and "other defects," could be hauled from the point of discovery (Tacoma or South Tacoma) to the nearest available repair point *from Tacoma or South Tacoma*, and in such way as was absolutely necessary to get it to such repair point; provided, of course, it could not be repaired at Tacoma or South Tacoma, which was not shown or even suggested by defendant; and provided further, that the manner of movement was also necessary, which was not shown, so far as Tacoma, South Tacoma, or Auburn are concerned.

Having in mind the fact that this car was assembled in a commercial train at Auburn, hauled from there in association with good-order cars, and no attempt made to justify such *manner of movement*, even (for the sake of argument) as the necessary result of the strike, the Court should have instructed the jury that its verdict must be for the Government as to any car that left Auburn or Centralia in the defective condition complained of by the Government. (See Questions Involved No. 5; Assignment of Error 36, page 78 hereof.)

This request (Government's Request No. 5) should also have been granted for the reason that defendant made no effort to justify the movement from Tacoma or South Tacoma.

Therefore, plaintiff's Requests Nos. 12 and 14 (Rec. 314, 315, page 81 hereof) should also have been granted, for two reasons, 1st, because, as a matter of law, no justification should be said to exist for making up a commercial train at a division terminal and include therein cars with serious defects; 2nd, because in this case defendant made no effort to show that it could not have made up a so-called hospital train and hauled to Renton the 24 or 25 cars that were to receive general repairs, including the 8th count car. Had such a train been made up at Tacoma or South Tacoma, where the cars were really discovered to be defective, it would have saved time and work and considerable unnecessary switching, all of which would have had a strong tendency "to promote the safety of employees and travelers."

This construction of the phrase, "if such movement is necessary," was adopted by Judge (later Justice) Clarke in a case against the Erie Railroad, unreported. Notwithstanding the fact that the Sixth Circuit Court of Appeals reversed the judgment in this case (240 Fed. 28), basing its decision upon the construction of the sub-Proviso, we find so much reason in Justice Clarke's opinion that would tend, if adopted, "to promote the safety of employees and travelers," that it is deemed advisable to call attention to the following language therefrom:

For the purpose of this motion we have it admitted that these five cars which were out of order were hauled a distance of three or four

miles from a switching yard, in which they were assembled from various railroads and plants, to another switching yard, where there were repair shops; and that they were hauled in what may be called a commercial train, having in it cars loaded with interstate traffic or moving in interstate commerce, and some of which were in good order. We must also assume, for the purposes of the motion, that the cars in question were otherwise defective than in the respects proved by the witnesses so far called; that in these other respects they could not be repaired at the point where the defects were discovered by the government witnesses, the NK yard, and that they must be taken to Briar Hill yard to be repaired.

The question is whether the evidence introduced, taken with the assumptions which I have stated, made necessary the movement which it is admitted was made, or whether the language of the act is such that courts and juries may distinguish between one manner of movement and another and say that one manner of movement is necessary and another not. Assuming that the cars must be moved from the NK yard to the Briar Hill yard in order to be repaired, does this act give the common carrier the right to move them in any way it sees fit? Or, must they be moved in a manner consonant with the spirit and purpose of the act itself before the movement can be said to have been necessary?

The Circuit Court of Appeals of this Circuit, in speaking of this act before the 1910 amendment, says:

“It is well settled that the object of the safety appliance act being remedial and humanitarian in its purpose, to protect the lives and limbs of railroad employees by making it unnecessary for men operating the couplers to go between the ends of the cars, the act is not to be construed so narrowly as to defeat the obvious intention of the legislature.” (*Southern Railway Co. v. Snyder*, 187 Fed. 492.)

If that is the purpose—and, for the purpose of this motion, we must accept this as settled law—then it would seem to me to be the duty of the court to construe this proviso in such a manner as will enable us to distinguish between movements which are made, let us say, in a manner which would expose the employees to extraordinary dangers as compared with movements which might be made of the cars which would expose them to lesser risks. Considering only the case which we have in mind, of cars assembled in a yard for distribution to various railroads, and having before us simply the question where a number of cars are found scattered through such a yard in a condition of repair such that the law forbids their movement unless they fall within the proviso of the act, I am persuaded that it will not do to say that a necessity existed for transporting those defective cars in a train in association with cars in good order, and that no amount of proof which could be produced would justify the court in submitting the question of the existence of such necessity to the jury. It would have been no great expense, it would have been no great inconvenience for a com-

pany under such circumstances to run a special train of bad order cars from the NK yard to the Briar Hill yard.

Such a movement as the one admitted to have been made, as has been aptly said, might be at night, and must be made under such conditions that the men working on the cars would not know which cars were in good order and which were not. I cannot think, having regard to the purposes of this act, as construed by the Circuit Court of Appeals of this Circuit, that I should submit to the jury the question of whether or not the necessity existed for hauling these defective cars in the manner in which they were hauled over the line of the defendant.

It will thus be seen, that the Proviso in chief permits certain movements for repair, *if the manner thereof is necessary*, but by the express terms of the sub-Proviso, "the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, * * *" was not considered by Congress as a necessary manner of movement.

In a case against defendant herein, *supra*, this Court considered the necessity for certain manner of movements, and in its opinion said, at page 784:

Or, we presume, in a case where there are no means for repairing the cars at the junction of the roads, they might be hauled, *without being taken into freight trains or used therein*, and thus moved, in what are termed hospital trains, to a convenient place for repair. (Italics ours.)

If there is no justification for commingling good order and bad order cars at a junction point, where there are little or no facilities for repairing or switching or storing cars, how can there be any justification for assembling them in a 77-car train at a busy terminal, through which 2,500 cars are handled daily, with all the necessary switching that such assembling must involve?

And, for similar reasons of wisdom and safety, the trial Court should have charged the jury, as requested by plaintiff in its Request No. 15, to the effect that "other defects" can not be used as an excuse for not repairing a penalty defect, a missing brake wheel. We agree that in some cases it might be true that "other defects" might prevent a penalty defect from being remedied; but if so, the carrier, who must justify any movement of a defective car, should show such relation between the penalty defect and "other defects" as would prevent the former from being repaired, even temporarily, until the latter had received some repairs. But no attempt was made in this case to show such relation between the several defects.

(d) *The Court erred in refusing to instruct the jury as follows, as requested by plaintiff, being its Request No. 9 (Rec. 314):*

The provisions of the safety appliance acts are of such nature that they can not be ignored or set aside by a carrier on the ground that a strike has interfered with its operation. But the safety of other employees, those who operate

trains, as well as the traveling public, is to be placed above the question of inconvenience to the carrier of keeping its equipment in repair.

(ASSIGNMENT OF ERROR 38.)

The Court merely read to the jury the *first sentence* of this Request (Rec. 301), but refused to instruct the jury with respect to the question of inconvenience, as requested in the last sentence.

The fact that it is inconvenient "to promote the safety of employees and travelers" can not be accepted as an excuse.

United States v. Pere Marquette, 211 Fed. 220.

United States v. A. T. & S. F., 220 Fed. 215.

Virginian v. United States, 223 Fed. 748.

Pennsylvania v. United States, 241 Fed. 824.

Cases Cited, Kent's Digest (1915), p. 15 (d).

We can not escape the conviction that, even without legislative requirement, a carrier's convenience should be subordinated to the safety of employees and travelers. And as a general proposition, if we may judge by the few decisions on the subject, most carriers have seen the wisdom of such policy.

(e) *The Court erred in refusing to grant plaintiff's Request for Instructions No. 13, in that it refused to instruct the jury that "as to each of the cars hauled from Auburn or Centralia the jury must return a verdict for the Government unless the defendant has shown," among other things not heretofore considered (Rec. 315):*

4th. *That the defendant was hauling the car for the sole purpose of putting it in repair, and that such repair could not be made at Auburn or Centralia,*

5th. *That such car was actually repaired at the nearest available point from Auburn or Centralia.*

(ASSIGNMENT OF ERROR 40.)

The Court read the 4th condition, with the exception that it omitted the word "sole"; the 5th was rejected in toto. (Rec. 302.)

This request had, in part, a twofold purpose: The Court, as heretofore pointed out, had taken the position that it was only necessary to consider the nearest available repair point *from Auburn*, and therefore refused plaintiff's Request No. 1 (Assignment of Error 32), and also its Request No. 5 [3] (Assignment of Error 36). Request No. 13 was prepared to meet such a contingency, for the Government had a right to meet the defense that the movement of any car from Auburn or Centralia was justified.

There was no suggestion that any car moved from Centralia was for the purpose of repairing it, for in none of the five *Centralia* cases did the defendant show that any car had been properly equipped, and that it had discovered the defects; in fact, its defense was that each car was not defective when it left Centralia.

As to the *Auburn* cases, it was also contended that the equipment in question was not defective; but looking at it from another angle, it was not shown that the brake wheel could not be replaced at Auburn.

The 4th condition was a proper one, for we believe that the movement of a defective car from a terminal, if justifiable at all, must be for the *sole* purpose of being repaired, and while the omission of the word "sole" from the Court's charge may not have been misleading, it, nevertheless, should have been given as requested.

The difference between the 4th and 5th conditions is this: The 4th shows the *intention* of the carrier in moving a car; the 5th is but the *execution* of such intention. If there was a bona fide intention to repair a car at a certain place, the execution of that intention was certainly material; for, in this case, it would have tended to corroborate testimony as to such intention, and also would have shown, *in the absence of other evidence*, what repairs the car actually needed and received.

We have thought it advisable thus to explain the Government's position in respect to this Request No. 13, but it is only fair to this Court to say that, from a technical point of view, the Request may have been properly refused. In preparing same there was a phrase inadvertently omitted from the first part, which would have made it read:

As to each of the cars hauled from Auburn or Centralia, *if found to be defective as alleged*, the jury must return a verdict for the Government unless the defendant has shown:

The italicized part was omitted from Request No. 13, but this was interpolated by the Court when granting such request with respect to the first three conditions. (Rec. 302.)

QUESTIONS INVOLVED—No. 6.

ASSIGNMENTS OF ERROR 43 AND 44.

(a) *The Court erred in granting defendant's Request No. 8 and charging the jury, in effect, that the movement of the car involved in the 8th count FROM AUBURN, and the availability of AUBURN as a place for repairing such car, should be considered, although the car had been discovered to be defective at Tacoma or South Tacoma over 30 days prior to its movement from Auburn. (Rec. 305, 316.)*

(ASSIGNMENT OF ERROR 43.)

The Record with respect to this cause of action has been gone over several times from different angles; and, with the exception of two suggestions, we do not believe we can add anything to what has already been said.

But this should be noted: This car was discovered to be defective at Tacoma, or South Tacoma, over 30 days before it was moved to Auburn, but we know nothing about what defects were discovered, to what extent it was further damaged by the necessary switching in getting it out of Tacoma, or South Tacoma, into Auburn and out of Auburn again; the Record is "speechless" in this respect. But notwithstanding the fact that the bill for Renton repairs would show just what work was done (Rec. 209) (although this might not prove the car's condition

when it left Auburn, much less when it got into Tacoma, or South Tacoma, over a month before it left Auburn), defendant did not endeavor, to this extent, to bring itself within the Proviso.

There is one other important thing in connection with this charge, which is that portion reading as follows (Rec. 305):

The defendant *admits* that this particular freight car * * * *was in a defective condition.*

The defendant never made any such admission with respect to the brake wheel being missing; in fact, it refused to make such an admission (Rec. 53), and went so far as to deny that this car had a missing brake wheel (Rec. 250, 260). Therefore this Request and allowance thereof by the Court contained either an inadvertent misstatement, which naturally misled the jury, or was irrelevant to the extent that it related to the matters foreign to the issues; that is, to "other defects" only, and did not include therein the missing brake wheel. There was nothing in the evidence to indicate or suggest that the brake wheel could not very easily be replaced at Auburn, not to mention Tacoma or South Tacoma, if it was so defective there, and the effect of the Court's charge if not misleading, gave the jury to understand that the question of the brake wheel being replaced at Auburn was outside the issues. In either event the

Request was not justified and the allowance thereof was erroneous.

(b) *The Court erred in granting defendant's Request for Instructions No. 11 and charging the jury as requested, but more particularly as follows (the italics and capitals being ours):*

*The defendant * * * has alleged that * * * certain of its employees had left its service * * * and that among such employees were its car inspectors and car repairers, and that * * * it was * * * necessary that it use many of its other officers and employees for such (repair) purpose, and that it did not have available the repair facilities that it would have otherwise had, but that IT DID MAKE ALL REPAIRS NECESSARY to comply with the Act of Congress referred to and the regulations issued pursuant thereto AS ALLEGED IN THE SEVERAL CAUSES OF ACTION HEREIN. While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the Act of Congress and the regulations issued pursuant thereto under which this action is brought, YOU WOULD BE AUTHORIZED IN CONSIDERING THE EVIDENCE TO TAKE INTO CONSIDERATION SUCH SURROUNDING CONDITIONS FOR THE PURPOSE OF DETERMINING THE ISSUES SUBMITTED TO YOU, AND THE EVIDENCE IN CONNECTION THEREWITH. (Rec. 307.)*

(ASSIGNMENT OF ERROR 44.)

This whole charge, *requested by the defendant*, was but a brief résumé of certain features of the case; but it would appear therefrom that the admission of the mass of irrelevant testimony offered by defendant was attempted to be cured by the instruction that the strike and withdrawal of employees would not authorize the carrier to violate the law.

We believe that enough has been said with respect to the "strike" phase of the case, but in concluding this subject we would like to ask if, as said in the above charge, *defendant itself made all the repairs necessary to comply with the Act and Orders as alleged in the several causes of action*, in what respect was the "strike" testimony relevant?

QUESTIONS INVOLVED—Nos. 7 AND 8.

(18th count.)

ASSIGNMENTS OF ERROR 33, 34, AND 35.

One carrier can not receive from another carrier a car with a defective safety appliance; nor can it justify the movement of such car and bring itself within the Proviso, where it appears that the receiving carrier made no attempt to discover the defects and did not know that the same existed.

It was, therefore, error for the Court to refuse to direct a verdict for the Government; it was error to direct a verdict for the defendant instead of submitting same to

the jury; and it was error to enter judgment in favor of the defendant and against the Government. (Rec. 313, 314.)

It is unnecessary again to refer to the facts on the 18th cause of action, the only one involving a question of this kind; they are all set forth on page 18 hereof.

No reason was assigned by the Court for its action in directing a verdict for the defendant on this count, and we are at a loss to understand why such action was taken. But what little suggestion there was on behalf of defendant, its plan of defense, and possibly the Court's view of the situation, can be briefly referred to.

The Court *sustained* the Government's objection to the following question asked of the witness Winter on cross-examination by counsel for defendant (Rec. 110):

Do you think it advisable from the standpoint either of the Railroad Company or the general public in the city of Seattle to have had a crew of car repairers, who of course would be taking the place of the strikers, working on cars as close to Whatcom Avenue as was this transfer track?

But the following question was asked the witness Weeks on cross-examination by counsel for defendant, and an objection *overruled* (Rec. 172):

Is it your opinion, Mr. Weeks, knowing the conditions which you did know at that time,

that it would have been reasonably safe for any man—official or new employee of the Northern Pacific—to go out on that transfer between the street car track and Whatcom Avenue and attempt at that time to have shimmed up or repaired this drawbar?

Observe the answer to this last question (Rec. 173):

Mr. WEEKS. It would have been as safe there as any other place on the road, in my opinion.

Now, if the question of safety in making such repair on the transfer track was an issue in the case, it should not have been decided by the Court, but ought to have been submitted to the jury. See *Empire State Cattle Co. v. A., T. & S. F.*, 210 U. S. 1.

But the question of safety was not a proper issue in this count. The fact is the defendant did not refuse to receive the car from the Great Northern; it made no effort to inspect it, and therefore made no effort to repair it. In these respects the case is on all fours with that other case (No. 3909) against this same defendant, decided by this Court March 12, 1923. (287 Fed. 780.)

We believe it is unnecessary here to quote from the opinion of this Court in that case, for the whole opinion is a refutation of any suggestion of defendant that it did not violate the law in receiving and hauling from the Great Northern interchange track the car with the low drawbar.

CONCLUSION.

Wherefore it is respectfully submitted that the judgment of the trial Court should be reversed and the case remanded for a new trial, together with instructions to sustain the Government's demurrer to the affirmative defense of defendant's answer.

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No. 4080

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

NORTHERN PACIFIC RAILWAY COM-
PANY, Defendant in Error.

No. 4080

ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON
NORTHERN DIVISION

**Brief and Argument for Defendant
in Error**

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IN THE
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THE UNITED STATES OF AMERICA,
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vs.

**NORTHERN PACIFIC RAILWAY COM-
PANY, Defendant in Error.**

No. 4080

The statements at the opening and as found running through the brief as prepared by the Assistant Attorney General, who came to Seattle and took the responsibility of the trial of this case in the District Court, evidence a keen feeling of partisan grief that the jury was so bold as to find, on conflicting evidence, as against the contentions and evidence offered by the government.

The references to the evidence as received and excluded will be noticed in due course. It is sufficient here to say that many of the excerpts therefrom and the adverse references thereto are based upon disconnected and incomplete and, we believe in some cases, misleading references to the testimony both given and offered.

There is much criticism of the trial court and many references to the alleged attempts of the defendant in error to camouflage the real issues run-

ning through the opening statement. However, counsel, on pages 47 and 48 of his brief makes a segregation of eight questions, in the discussion of which he goes over the same matters. We will endeavor to limit our discussion, so as not to cover these matters more than once.

Generally speaking, these questions cover: first, a question of pleading; second, the admission and rejection of evidence; third, the evidence admitted and instructions given with reference to the shopmen's strike; fourth, the action of the court in failing to instruct for the government as to the eighth count; fifth, the action of the court in directing a verdict on the eighteenth count; sixth, the question of moving penalty defect cars, not coupled with chains, in revenue trains; and, seventh, a general complaint as to the modification and giving of certain instructions.

THE AFFIRMATIVE DEFENSE AND EVIDENCE IN ITS SUPPORT.

I.

In considering the assignments as against the affirmative defense, we believe that it is proper to include, in connection with a discussion thereof, practically all of the objections raised as to the evidence admitted in this case, all of which went to the competency of evidence showing the strike situa-

tion that confronted the defendant in error at the time of the various alleged violations, the basis of this litigation.

This affirmative defense alleges in substance that on the 1st day of July, 1922, what are known as the Joint Shop Craft Employees of the defendant, including those engaged in the work of repairing and inspecting cars and the doing of the general mechanical work in connection with their upkeep, in protest of an award by the United States Labor Board, ceased their employment and withdrew from the service of the defendant, and that their withdrawal was without fault on the part of the defendant and that it, pursuant to the directions of the labor board, proceeded to and used its best efforts toward obtaining other employees to perform this work, and was using practically its entire official staff for such purpose, at the time referred to in the several counts, in an endeavor to perform its duty to the shipping public; that in view of the situation it was physically impossible for the defendant to keep accurate, or any, records of the condition of the various cars, alleging, however, that all cars transported were properly inspected and no equipment was used which would endanger the safety of its employees in operation or those having business with it. The affirmative defense then alleges:

“That if any of the cars referred to in the plaintiff’s complaint were in the condition as referred to therein *the same arose as the result of an emergency* and beyond the control of this defendant and without any default upon its part, *and the defects, if any, were remedied as soon as consistent in view of such emergency and after movements made necessary thereby, at the then nearest most available point therefor.*”

This, in effect, was a denial that any cars that could be repaired were transported in any road movement and an allegation that defective cars moved, if any, beyond the point alleged in the complaint, which but for the emergency were repair points, were moved to the then nearest, most available repair point, although they were not in all cases moved for repairs, as soon as they would have been, except for the emergency.

Taking all of the facts pleaded, if it is at all material, the necessary inferences can be drawn from this pleading to bring this answer within the provisions of the amendment to Section 4 of the act as construed by this court in *U. S. vs. Northern Pacific*, 287 Fed., 780, *cited and referred to several times by the plaintiff in error*, and in any event, the jury were properly instructed in accordance with the request as made by the government and in line with such opinion, the court instructing the jury as follows:

“As to each of the cars hauled from Auburn or Centralia, if found to be defective as alleged, *the jury must return a verdict for the Government unless the defendant has shown: That such car had been properly equipped with the appliances described by the Act of Congress and the orders of the Interstate Commerce Commission; that the defective equipment became defective while being used by the defendant on its line of railroad; that the defendant, through its officers or agents, had discovered the defects; that (298-263) the defendant was hauling the car to the nearest available point from Auburn or Centralia where the car could be repaired for the purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia.*” (R. p. 302.)

A reading of the other instructions theretofore given by the court shows that the court was particular to an extreme degree in putting before the jury every provision, not only of the act itself, but of the regulations issued pursuant thereto and which were alleged to have been violated by the defendant in this case and many of which counsel has printed in his brief, the court instructing the jury that if they found that such provisions or such regulations had been violated, their verdict should be for the government. *So far as the technical sufficiencies of the matters pleaded or the words used in this affirmative answer are concerned, in view of the instructions given, this question of pleading becomes wholly immaterial.*

II.

Counsel for the government, on the first page of his brief, makes this statement:

“It might be well to state at the outset that in this case the carrier challenges the right and duty of the government to attempt ‘to promote the safety of employees and travelers’ during the period when certain of its employees were on a strike, and that the record clearly discloses that, during such period, the *defendant failed to do all that it could reasonably do in the interest of safety.*”

Counsel has italicized in his brief what we have italicized—this in the face of a record showing that every ounce of energy of the entire official staff of this defendant in error, pursuant to what we may safely say was the mandate of the government itself, was expended, many working as much as twenty-four hours without rest, to keep the railway company’s equipment safe (R. pp. 197, 216, 246, 267). *It is not a kind statement* in view of a record in which there is not a single inference that can be found that supports it, and it has *no more foundation under the record, or in fact*, than the other of the statements just quoted.

It was stated to counsel for the government and to the court at the opening of the trial and was repeatedly stated throughout the entire trial that it was not contended under this affirmative defense,

nor was it contended in connection with the evidence offered, that the shopmen's strike would in any way relieve the defendant from its obligations in connection with the movement of defective equipment under the Safety Appliance Act, excepting only in connection with the question of the "nearest available repair point."

The purpose of this affirmative matter, some of which the court might have stricken if moved against, as the same matters could have been proven under the defendant's denials, was to show, among other things:

A. That after full inspection and complete compliance with the Act, by the malicious acts of third parties equipment was deliberately broken and damaged, this was perfectly competent in view of the evidence of the two government inspectors as to time and place of inspection, and also observation of departing trains.

B. That the striking shopmen and their sympathizers so interfered as to prevent the use of certain of defendant's repair facilities.

C. That by reason of such emergency, the company could not, as it did in normal times, keep an accurate record, or any record as a matter of fact, of its car repair work or of its inspections, all of which was known to the two government inspectors.

D. As the evidence of the two government inspectors went to the point that their inspection as to the trivial defects covered by the several counts was made prior to the trains being made up, then if it was a fact, in view of the emergency, that such repairs were not and could not, by reason of the shortage of force, be made until the cars were in the train, evidence of such situation was competent.

E. That by reason of such emergency Auburn, South Tacoma and Centralia were not available repair points.

F. To establish that the company was not derelict as stated in the opening part of appellant's brief, and to put before the jury all the surrounding facts and the existing conditions in connection with the disputed questions of fact to be determined by it.

G. To explain to the jury, the reason the defendant's officials, who were witnesses, were doing car repair work at the time.

An examination of the evidence will show, both from the hour of the alleged inspections as made by the two government's witnesses and by the admissions made by them on cross examination, that practically all the cars at both Auburn and Centralia were inspected by them either prior to or at the time the cars were being switched into the train that is alleged to have hauled the cars therefrom (R. pp.

150, 158, 81), and it was certainly competent to show the surrounding conditions in connection with the evidence that, while in normal times ordinary repairs were made prior to the cars being switched into the outgoing trains, in view of the emergency, the official staff devoting its efforts to the work of moving the trains over the defendant's system, had neither the time nor the facilities to make these different repairs until the train was made up, and also to show that they had neither the time nor the facilities to make any records so as to have a memorandum of the actual cars moved after being inspected by them.

There is absolutely no excuse for any statement that the government is justifying itself for an appeal of this case for the purpose of determining whether or not a strike such as the shopmen's strike is an excuse for failure to live up to the Safety Appliance Act. Counsel for the government does need some excuse both for the necessity of a trial of this case and for an appeal when an adverse verdict was rendered. I do not mean that counsel is to blame either for the bringing of the action or for the appeal, but it is certainly small business on behalf of whoever is responsible, both for the institution of the suit and for the appeal, in view of the facts disclosed by this record and the existing situation and the attitude of the government at this time,

of which the court will take notice, for we repeat that from the opening of the case, and from prior to the receipt of any evidence it was expressly stated and continuously reiterated that no one would contend that the strike, in and of itself, would afford an excuse for failure to live up to the Safety Appliance Act. So that any argument that attempts to justify this appeal on the ground as stated is wholly without foundation, both as a matter of fact and under the issues and the law as the case went to the jury.

III.

We quote in full Amended Section 4; this for the convenience of the court:

“Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in Section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: PROVIDED, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, *such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the*

nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or Section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first eighteen hundred and ninety-six, *if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point*; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

We have italicized certain of the language used which language is pertinent to this discussion, and it will be noted that the act provides for the movement of defective equipment not to the nearest but to the "nearest available point" where such car can be repaired, and that it further provides that such movement shall be authorized if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point.

We ask the government in all sincerity to show

to this court, if it can, upon what ground it can be successfully contended that the situation with this shopmen's strike as it affected this defendant at both Centralia, South Tacoma and Seattle, was not material in the determination of the question as to whether or not Auburn, Centralia or South Tacoma were available repair points, and to point out to this court, if they can, why this evidence was not material in connection with the contention of defendant that Renton was the nearest available repair point.

Outside of the emergency incident to this strike, this court would almost take judicial notice of the fact that at both Auburn and South Tacoma this company maintains some of the largest railroad repair shops on the Pacific Coast. Both of these points are terminals, and excepting for an emergency such as pleaded and such as proven there would have been no escape from the penalties imposed by the Act if a defective car had been moved beyond such terminals.

We also suggest that the government advise this court why, with Auburn being admittedly a terminal with large shops, the inspectors themselves pass 23 cars admittedly defective moving with the one defective car covered by count eight to the Renton shops for repairs. (See Rec. p. 240.) Is it reasonable, in view of the fact that each count

covers strictly technical defects, on log flats moving on level track but a few miles, that these inspectors would overlook these 23 other cars if they themselves did not know that by reason of this emergency Auburn was not, in the language of the statute, an available repair point at the time.

In the case of *U. S. vs. Boston & M. R. R. Co.*, 243 Fed. 795, in the District Court of Massachusetts, District Judge Morton, referring to the terms of this amendment and the use of the word "available," uses this language:

"The statute permits a defective car to be hauled, not simply to the nearest point where it can be repaired, but 'to the nearest available point.' The word 'available' cannot be ignored. It has been judicially defined (in connection with the word 'assets') as follows:

"The word 'available' must have been inserted for some limiting or qualifying purpose. It must have been intended as including certain assets and excluding others, else there was no reason for its use. The ordinary meaning of 'available' is 'usable, capable of being used to advantage.' *Hamilton vs. Menominee Falls Quarry Co.*, 106 Wis. 352, 359; 81 N. W., 876, 878.

"Availability obviously depends, under the statute, on other considerations beside that of mere distance. Whether Fitchburg was, under all the circumstances, the 'nearest available' point for the repair of this car, was a matter of business judgment. Upon such a question, involving as it does many elements, the decision of those in charge of the business, if made in

good faith, is entitled to serious consideration. It is not shown to have been wrong in this instance."

In *Denver & Rio Grande Ry. Co. vs. U. S.*, 249 Fed. 822, Judge Amidon in speaking for the Circuit Court of Appeals for the Eighth Circuit, uses this language:

"We do not lay down any absolute rule which would forbid hauling a defective car past an intermediate repair point. It might be that *the congestion of defective cars at that point*, or the seriousness of the defect in the car hauled, *would be such as to justify the movement*. All we say is that, when a car is hauled past the nearest repair point at which a supply of men and materials is kept, adequate for making the repair required, this justifies the holding that the law is violated, *unless there is a showing of special reasons for the movement*."

As suggested by Judge Amidon and as Judge Cushman told the jury in this case (Rec. p. 297) the defendant had the burden of showing as to the one or possibly two counts, that Auburn and Centralia were not available repair points, and such was the purpose of the evidence.

However, it would be difficult to frame any better language than that used by Judge Cushman in instructing the jury in this case:

"So far as the question concerning all those counts of the complaint where the defendant contends that the car was moved for the purpose of repairing the defects at the nearest

available repair point, if you find the defect to have existed and that the car was moved out of the yard on to the main line, *the burden of showing by a fair preponderance of the evidence that the removal was necessary* in order to have the car repaired, that it could not be repaired in the yard and it was being removed to the nearest available repair point,—the burden of establishing those matters by a fair preponderance of the evidence *rests upon the defendant.*

“There has been considerable said in the evidence and in the argument regarding the effect of the strike. *You are authorized to take what the evidence has shown regarding this strike into account in determining (294-259) whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective.* You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops and machinery and tools to effect repairs, but it would be necessary to have men to operate those shops, tools, equipment and machinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, *it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points,* and it would not be a violation of this law to move a car to a repair point and remedy the defects

where that condition did not exist, or was not so acute, or where the friction was not so great. There may be other things that you might consider the strike as bearing upon. A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused (2950260) it can affect their judgment and can effect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. *It works both ways.* That fact may enable you to harmonize to some extent the dispute in the evidence without finding it necessary to determine that one side or the other tried to deceive you." (Rec. p. 297, 298 and 299.)

"It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by 'necessary' I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by defendant for such purpose was not a violation of the law, and if you so find, your verdict should be for the defendant on this cause of action." (Rec. p. 305 and 306.)

In connection with this argument, it is proper to quote other instructions given and at the same time dispose of some of the other assignments. Judge Cushman instructed the jury:

“If the jury believes, upon a fair preponderance of the evidence, that any car was hauled by the defendant from Auburn, or Centralia, in the condition alleged in the Government’s complaint, its verdict should be for the government on any such cause of action, unless moved for the purpose of being repaired, as I have explained to you.” (Rec. p. 300.)

This instruction, excepting that which is underscored, was the government’s request No. 5, and although given, the government assigns and argues as its error 36 the alleged refusal to give it.

The court also instructed the jury:

“It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case. Yet you may consider what the evidence has shown in that respect in determining the nearest available repair point.” (Rec. p. 300.)

This instruction was, excepting that underlined, the government’s request No. 8, concerning which, by *Assignment 37*, they allege and argue error in refusing to give, although, as stated, it was given verbatim.

The court further instructed the jury:

“The provisions of the Safety Appliance Act are of such nature that they cannot be ignored, or set aside, by a carrier on the grounds of inconvenience to the carrier of keeping its equipment in repair.” (Rec. p. 301.)

This is a portion of the government’s proposed Instruction No. 9, covered by one of its assignments of error, and contains the substance thereof, and in fact the rest is covered by preceding instructions quoted, so that there is absolutely no more reason or merit in making this assignment, than the assignments as to the government’s instructions No. 5 and No. 8 which as stated were given.

The government, by its *Assignment 39* alleges error in refusing to give its proposed instruction No. 12. The court did give Instruction No. 12 verbatim, as he did the other instructions complained of, adding thereto the words underscored. The court’s instruction reads:

“In order to comply with the spirit of the law, the defendant cannot establish a division terminal and make up trains at such terminal, and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government. Notice the words ‘in road service.’ They would have a right, if they could not be repaired there and it was necessary to

move them in order to secure the repairs, to haul them to the nearest available repair point, because that would not be in road service."
(Rec. p. 301.)

What we have said as to the last error assigned, equally applies to the *error No. 40* which refers to Instruction No. 13. The court merely added to said instruction the language which we have heretofore quoted having to do with the movement of cars to the nearest, most available repair point, on many pages of the government's brief, will be found statements urging that error was committed either in not giving or in adding the language underlined, a sufficient answer is that the instructions were given and the added proviso is but a correct statement of the law.

We also in this connection call attention to the fact that the proposed instruction of the government covered by *assignment of error 42* was given by the court, the court adding thereto the words underlined, such instruction reading as follows:

"The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, cannot be considered an excuse for not repairing the defective equipment in question; provided you find it could have been repaired at Auburn or Centralia."
(Rec. p. 302.)

Further in connection with instructions which

were requested by the government and as showing what issue was actually submitted, the court further instructed the jury:

“While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you, and the evidence in connection therewith.” (Rec. p. 307-8.)

The fact is that the court went over these instructions proposed by both sides carefully and the exceptions that were taken and the errors that are assigned excepting only in connection with the movement of penalty defect cars in commercial trains and as to the direction of a verdict as to count 18 are highly technical and wholly without merit.

We have felt these instructions, while treated under various headings by the government, should properly be discussed in connection with the other instructions covering the law as the case was given to the jury, and to show the purpose of offering and the reason for the admission of the evidence showing the strike situation.

There was no shifting from this issue—there was no camouflage, and while we will refer more

specifically to some of the evidence objected to, we submit that it was all competent in connection with refuting the testimony of government witnesses by showing the surrounding conditions in connection with the defendant's alleged justification under the terms of the statute of the movement of one car from Auburn to Renton and if the jury should have found for the government on the question of defects as to the one car moved from Centralia upon which it is alleged the logs fouled the handhold.

ADMISSION AND REJECTION OF EVIDENCE.

The court instructed the jury that there was no duty on the part of the government inspectors to call attention of any representatives of the railway company to the alleged defects (Rec. p. 300) and no such contention was ever made. Counsel complains, however, because his Witness Winter was asked whether he had advised any of the employees of the defendant. This witness answered, without any objection being first made, that he had not. It is true after he had so answered the question was followed up by enumerating the inspectors who inspected the train upon which it is alleged certain of the defects were found, the witness answering

that he had not. (Rec. p. 79.) Upon re-direct examination, the following is found in the record:

Q. Mr. Winter, you were asked if you notified any of the officials around there,—some of them being named,—as to having found these cars defective, and your answer was that you did not.

A. I did not.

Q. Now, will you state to the court and jury why you did not do that?

MR. WINDERS.—I object to that on the ground that it is immaterial why he did not.

THE COURT.—Objection overruled.

A. Well, a good many times, as in this case, we find that it does not do any good. (115-80.)

MR. WINDERS.—I move to strike that answer and that the jury be instructed to disregard it.

THE COURT.—I will deny the motion.

Q. (Mr. LIST, continuing.) State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment?

MR. WINDERS.—I don't think that is material. I object to it on the ground that it is not material.

MR. LIST.—We are trying to show that we have been more than fair to you.

THE COURT.—Objection sustained.

MR. LIST.—I offer to prove by this witness that on August 31 he reported to one of the officials of the Northern Pacific of having in-

spected about two hundred cars and having found approximately fifty of them in a defective condition; that he gave to the Northern Pacific official the record showing the individual numbers of these cars found defective.

MR. WINDERS.—Now, of course, counsel knows that is not competent. I object to it. We deny the allegation.

MR. LIST.—You opened the door.

MR. WINDERS.—I did not open the door.

THE COURT.—I permitted Mr. Winders' original question as to reporting to the officials of the railroad company, and Mr. Winders on cross-examination had a right to show, if he could, (116-81) any conduct on the part of the witness from which he might argue that it was inconsistent with his testimony. You would have a right on re-direct to explain why he did not make the report on those particular cars, in order to explain away the conduct that Mr. Winders was probably preparing himself to argue as inconsistent with his testimony; but you could not go into other cars.

MR. LIST.—He has answered that question, which your Honor permitted, that he found out that it did not do any good.

THE COURT.—I sustain the objection to your offer. The jury are instructed to disregard any statement or allusion to any other cars found defective and reported." (Rec. pp. 116-117.)

Counsel, although no exception was reserved, complains as to the action of the court in refusing the offer made as quoted above. Counsel devotes pages 56 to 59 of his brief arguing that the

court's action in this regard was error. We submit the foregoing quotation from the record is sufficient answer.

On the next page—at the top of page 60, counsel quotes from a part of a retort in a question, after an irresponsive answer given by the witness Winter, and then on page 61 and 62 attacks the cross-examination of Winter wherein he was asked if some of the strikers didn't complain about equipment and to the refusal of the court to permit him to show that these inspectors had been lenient and refers to page 145 of the record to support a statement which he repeats throughout his brief that the last defective equipment reported as against the Northern Pacific was on June 21st, while this is immaterial, it is significant that the record referred to don't show there was not other examinations and don't support a statement that other equipment was found defective.

We are not impressed with the pertinency of all of this argument having to do with the cross examination of these witnesses in view of the verdict returned by the jury. However, while it is not our intention to pay too much attention to the alleged references and to quotations of excerpts from the record, we will meet counsel as to Winter's testimony.

On direct examination the witness Winter tes-

tified that he tried the brakestaff on several of the cars of which complaint was made. (Rec. p. 49.)

On cross examination he further testified:

“Q. Now, you have testified that you got up on these five or six or seven log flats on which you say the brake staff was bent and you tried that brake staff?

A. Yes.

Q. Was anybody with you up on the car? Did Weeks go up there with you on the car?

A. It is not necessary to get up on the flat car sometimes to tell whether hand brakes will operate or not.

Q. *Did you get up on these flat cars and try these hand brakes on which you claim the brake staff was bent?*

A. *I think we did.*

Q. *Did you or did you not? What is your testimony?*

A. *I would say ‘yes.’*” (Rec. pp. 74 and 75.)

Later on, still on cross examination, he testified:

“Q. Not on that individual car. Did you get on that car and try the brake?

A. I tried the brake. *I would not say whether I got on the car or not.*

Q. Did Mr. Weeks try it with you?

A. He did.

Q. You both tried it. Could you try that brake from the ground?

A. You could, yes. (75-40.)

Q. Was there a load of logs on it?

A. The car was loaded with logs; yes, sir.

Q. Did you try it more than once? Did you try that brake more than once?

A. *I would not say that we did.*

Q. *What is that?*

A. *I would not say that we did.*

Q. *Well, the jury would like to know whether you did or did not.* Did you try the brakes on that car, the fifth cause of action,—more than once?

A. We tried the brake when we inspected the car and noticed the condition of the car. And when it left in the train at 9:50 it was in the same condition.

Q. Of course you understand that in order to get a conviction you have to testify that. Now, you mean to tell this jury in answer to my question that you tried the brake on this car more than once?

A. I would not say that I did.

Q. Did you or did you not?

A. I would not say.

Q. Did you on that day try the brakes on any of these cars more than once?

A. I don't know. I would not say.

* * * * *

Q. *You won't say that you got up on the car, will you, Winter? (76-41.)*

A. *No, sir.*

Q. At that time there were some of these trainmen,—I don't say all or the majority of them, but a few of the trainmen working for the

Northern Pacific and the other railroad companies that were not out on strike that were quite active in trying to help the strikers out?

MR. LIST.—If the court pleases, that is objected to as incompetent, irrelevant and immaterial.

THE COURT.—Objection overruled.

MR. WINDERS.—It is a preliminary question.

MR. LIST.—Exception.

Q. (Mr. Winders, continuing.) There was a stray man or two that was not any too loyal to the railroad?

A. I would say generally—

Q. I didn't say generally. I have a great deal of pride in the employees of the Northern Pacific; but I say there were a few stray ones that were not very loyal,—that were trying to help make things as miserable as they could in the operation of these yards,—isn't that true?

MR. LIST.—If the court please, we object to that as incompetent, irrelevant and immaterial.

THE COURT.—I think I will sustain the objection to that.

Q. (Mr. Winders.) Is it not a fact, Mr. Winter, that there were continually tales being carried to you and to Mr. Weeks from men who were drawing salaries from the Northern Pacific and from other corporations, complaining about the equipment?

A. Yes, sir. (77-42.)

Q. Did any of these men tell you,—referring to this fifth cause of action,—that this particular brake staff was bent?

A. No, sir.

Q. Did any of these men call your attention to this particular brake staff?

A. No, sir." (Rec. pp. 76, 77 and 78.)
Still later he testified:

"Q. Well, your answer as to this fifth cause of action as to getting up on the car and trying this brake,—would your answer as to these other cars on which you say the brake would not work be equally indefinite? *Did you or did you not get up on any of the cars on which you claim the brake staff was bent so that it would not work?*

A. *I would not say.*

Q. Did Mr. Weeks in your presence get up on any of them?

A. I cannot tell.

Q. Did you see him when he was with you work any of these brake staffs?

A. Yes, sir.

Q. You did? So as a matter of fact you were together, were you? (79-44.)

A. Yes, sir." (Rec. p. 80.)

We have underscored the language used, in the one question of which a partial excerpt is quoted as above stated, showing the connection with the other examination.

On re-direct examination, although this witness stated on cross examination that the striking trainmen had pointed out defects to him yet he had paid no attention to their suggestions, counsel complains

because he was not permitted to show that the witness was accused of being too friendly to the defendant. The court said that the evidence was clearly not in rebuttal of anything, and sustained the objection because he did not want the record encumbered with a lot of immaterial matter.

EIGHTH CAUSE OF ACTION.

There was no contention made at the trial that any of the cars were moved to Renton for repairs other than the one car in the 8th cause of action. There is no confusion on this point because the record is clear.

At the time of the examination of the first government witness this car, which is No. 67105, was admitted to have been moved from Auburn to Renton in a defective condition, (Rec. p. 53) and this admission with the statement that it was the only car that was so moved for repairs from Auburn to Renton was repeatedly made throughout the trial, as was the further statement that it was the defendant's contention that none of the other cars, when actually moved, contained the defects complained of.

“MR. WINDERS.—I will admit that there was only one. That is the one in the eighth cause of action. The rest were all taken

to Narco, which is the dump of the Northwest Lumber Company. It is just beyond Renton.

Q. (Mr. List.) Refer now to extra 1263.

THE COURT.—That is, you admit that those going to Narco were not moved for the purpose of repairs?

MR. WINDERS.—Yes.” (Rec. pp. 232, 233.)

“Q. I thought you said they went to some point beyond Renton. Didn't you say that these cars went to some point beyond Renton?

A. The other loaded cars.

Q. I am talking about the ones involved in this case?

A. Oh, yes, I understand.

Q. They went beyond Renton?

A. All except one.

THE COURT.—Did you say they had defects?

THE WITNESS.—I said this one car did.

Q. (Mr. List.) Have you got any notation of that?

A. This one car is marked Renton shops,—that and 23 others. The conductor had a car waybill or some information showing that those cars were going to the Renton shops.

MR. WINDERS.—He has not testified there was any (236-201) other defective cars.

THE WITNESS.—No, I thought we were here the last couple of days to show those were not defective.” (Rec. pp. 239-240.)

The evidence shows that this car covered by the eighth count, with twenty-three other defective cars

were sent from Auburn to Renton for repairs, there being no facilities at either Auburn or South Tacoma at the time, and under the evidence Renton was the nearest available repair point.

It is true this car became defective while on the defendant's system at Tacoma some time prior to its being moved from Auburn to Renton. Why the government inspectors singled out this one car and not the other twenty-three is still one of the mysteries in connection with this case. Counsel for the government has stated at several places in his brief that it was denied by the witness produced by the defendant that this car was defective, as alleged, and that there was affirmative evidence in the record that if it was there were facilities at Auburn to make the repairs, and also devoted considerable space to the fact that the car had originally become defective at Tacoma some time prior to the movement from Auburn.

We cannot believe that counsel is any more serious in connection with the presentation of his views with reference to this cause of action than he is as to the others, for the record does not support his statements.

Superintendent McCullough, who had jurisdiction both over the tracks at Tacoma and Auburn, testified:

“Q. (Mr. Winders.) Why was that car going to Renton?

A. For general repairs, together with twenty-three or twenty-four others just like it.

Q. Did they go in this same train?

A. Yes, sir; altogether.

Q. All bad order cars?

A. All heavy flat cars going to Renton shops to be repaired.

Q. You say that car was with twenty-three or twenty-four others in this same train?

A. This report shows a total of twenty-four flat cars all together.

Q. Twenty-four flat cars were moved out as defective cars to Renton for the purpose of being repaired?

A. Yes, sir.

Q. As a matter of fact, where did that car become in bad order, Superintendent McCullough?

A. The previous movements of this car No. 67105, was that it arrived in Tacoma on July 29, with a load of logs, and was unloaded and found bad order, and held out of service, and it accumulated with other bad order heavy repair cars and moved over to Auburn on the night of the 30th,—August 30th, and then moved the next morning,—the whole bunch of them,—to Renton shops.

Q. The same train with these loaded logs going to Narco?

A. Yes, sir.

Q. In that train there was a total of twenty-three cars that were in bad order?

A. Twenty-four.

Q. They were not under load any of them?

A. No.

Q. At that time were you familiar with the situation existing in the Auburn yard so far as repairs were concerned?

A. Yes, sir; that is one of my chief businesses to keep in touch with it; although I had relieved myself as car inspector and car repairer."

* * * * *

"Q. Were there any facilities in Auburn at that time in connection with the general movement of freight through there, including the facilities and available men to make repairs on these cars in Auburn?

A. Could not have been done; no, sir.

Q. Was there any other place that was more available to your knowledge at which these cars could have been repaired than Renton?

A. No, sir; not even South Tacoma.

Q. During this same period in addition to this day you had sent other cars to the Renton Car Works for repair?

A. Yes, sir; crowded them in as tight as we could. They built additional tracks to take them." (Rec. pp. 224, 225, 226.)

R. M. Crosby, Mechanical Superintendent, testified:

"Q. On the 31st day of August, the evidence will show, on train leaving Auburn as was testified at 9:50, as a matter of fact it registered out at ten,—he had on that twenty

log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we (197-162) at that time on the 31st day of August have men available to put them in condition at Auburn?

A. I would say no. We did have men, but not sufficient.

Q. It was the honest judgment of yourself and the other officials of the Northern Pacific that it was an absolute necessity to take those cars to Renton for the purpose of being repaired?

A. Yes, sir." (Rec. pp. 198, 199.)

"Q. *The cars that were sent to Renton,—were they all sent from Auburn or also from Centralia,—along about August 31st and the 2d of September?*

A. *I have no record of any sent from Centralia, but naturally they would be sent because we sent log flats at that time for heavy repairs to Renton.*

Q. Where would you draw the line between the cars that you would send to Renton and those that you would repair there?

A. A car that was pretty badly shook or required sills in normal times would go to Renton. Of course at this time a car with less repairs would go there. We would naturally send cars to Renton at that time that we would not send under normal conditions.

* * * * *

"Q. Would you when you sent cars to Renton that had to have heavy repairs, but also needed these light repairs, which could have been repaired in a minute,—would you make those light repairs to the penalty defects, before sending the car to Renton?

A. We would if we had time, but we had other more important work to do at that time, and it would be questionable whether cars going to Renton would receive the same attention as if going out on the main line for our regular traffic.

Q. There was no line drawn, really, between the character of cars which you repaired in your own yard and those that you sent to Renton, so far as the Safety appliance defects are concerned?

A. Only in so far as what I have told you, —*If we had a car going there that was shook up, why at that time the chances are that they would not be as particular with the car as they would be with a car that was going out in a commercial train.*

Q. You mean in making the repairs to the Safety appliances?

A. *I am talking about safety appliances, or any other appliances.*” (Rec. pp. 205, 206, 207.)

Road Master Allmain, referring to this car, said:

“Q. *Would you have tried to put on a brake wheel on a car (260-225) that was marked for the Renton car shops for repair?*

A. *We would not attempt to make repairs to such a thing on cars that went to the car shops.*

RE-CROSS EXAMINATION.

(By MR. LIST.)

Q. Mr. Crosby then was mistaken when he

testified that he always tried to make temporary repairs to cars before they left?

MR. WINDERS.—I haven't any record that he so testified.

THE COURT.—I sustain the objection. When you compare the testimony of one witness with a former witness you always produce a situation which leads to confusion." (Rec. p. 265.)

It is true that in answering general questions which clearly referred to defects on cars not going to Renton for repairs the witnesses did testify that such cars did not leave Auburn in the condition as testified by the government inspectors but such evidence was confined to cars other than the twenty-four bad order cars admittedly going to Renton for repairs.

We have sufficiently discussed the exception to Section 4 of the Safety Appliance Act and although many pages are devoted to a discussion of this eighth cause of action by the appellant, we believe that the evidence quoted above is a sufficient answer thereto. It is not true, as counsel states, that the company had facilities, or rather men, at Auburn and Tacoma, there is no evidence and no inference to support that statement and the further statement that the company denied that the car referred to in this cause of action was in the condition as alleged.

COUNT THIRTEEN.

By this count the government claimed that a log on a log flat car fouled the end handhold. It was the defendant's contention that by reason of the bunks on the log flats it was impossible for the end of the log to get within two inches of the end handhold, and several of the defendant's witnesses testified that they never knew of any such an occurrence in their many years of railroad experience and did not believe that it was possible to occur on a log flat. Complaint is made that the government was not permitted, in rebuttal, to show that it had made complaints of a similar condition before. It is not our opinion that such evidence was competent, there being no contention that the men who testified they had never heard of such an occurrence had been ever notified of such complaints, but the fact is that both Weeks and Winters (Rec. pp. 179, 188) were permitted to testify that they had called attention of certain of the employees to such condition. This evidence went in without any objection on our part.

Counsel then wanted to show that two of his inspectors had gone into the Auburn yards on the day of the trial and found a log flat loaded with logs which, if the load swerved enough, might not afford sufficient clearance. It is not our intent to

devote any time to show that this evidence was not competent, nor in considering the argument as to the dimensions of the log bunks on other cars concerning which there was no dispute in the evidence unless it be between his own inspectors.

A reading of page 186 of the record shows that the witness Winter testified that some of the bunks were as low as four inches and was also permitted to testify that he had measured some on the morning of the trial that were only four inches. (Rec. p. 189.) We will not quote the offer as to reports made by this witness to the Interstate Commerce Commission, counsel himself stating that the company would have no knowledge thereof. (Rec. p. 188.) A reading of the same pages of the record last referred to likewise will be sufficient to dispense with the necessity of any further argument with reference to this count.

We do direct the court's attention to the fact, however, that there is in the evidence, and without dispute, that if this log was in the position as complained of that then there were absolutely no facilities in Centralia, and within the yards of this defendant to unload it, (Rec. p. 276) and under this evidence it was at least a question for the jury, even if they found the log did foul the grab iron, to decide whether or not Centralia at that time was an available repair point or whether as a matter of

fact the nearest available repair point was the point where the logs were actually dumped as shown by the wheel reports.

It is only as to the eighth cause of action and to this thirteenth cause of action that any contention was made at the trial as to any movement under the exception to Section 4. The record shows that both prior to the case being submitted to the jury and in the presence of the jury it was so stated by counsel for the defendant in error, so that there was no shifting of positions and there was no camouflage, and there was no uncertainty either in the minds of counsel, court or jury as to the one car from Centralia and the one car from Renton being the only two cars, that under any finding by the jury would call for the application of or the determination of the question as to the nearest available repair point under the proviso referred to.

APPELLANT'S PROPOSED INSTRUCTION NO. 14.

MOVEMENT OF DEFECTIVE CARS NOT COUPLED WITH CHAINS, IN COMMERCIAL TRAINS.

The government devotes from page 80 to page 91 of its brief to a discussion of one of the only two questions of law that could possibly be raised under the record. There is also included in this discussion

the appellant's proposed instruction No. 5, and its exceptions to instructions given, its Exception 43.

These assignments raise the question as to the right of respondent to transport to the then nearest, most available and practicable repair point equipment becoming defective on its system not fastened together with chains and moving in revenue trains. There are several statements in connection with this discussion as to there being no evidence that South Tacoma was not at that time an available repair point. We have already quoted Superintendent McCullough's testimony showing that it was not, and also from the evidence of Mr. Crosby. It is true that there is a statement in the record from Mr. Crosby, speaking generally as to where the company had repair points, in which he mentions both Auburn and South Tacoma, but there is no justification under the record for the statement that there is no dispute but what South Tacoma was an available repair point at the time. In any event this question was one properly submitted to the jury.

The 1910 Amendment to Section 4 of the original Safety Appliance Act, by express terms provides that where any car which shall have been properly equipped, becomes defective while being used by a carrier on its own lines, such car may be hauled from the place where it first became defective to "the nearest available point where such

car can be repaired, without liability for the penalties imposed, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point," and after providing that the carrier shall be liable for injuries to employees, further provides that "Nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

The attorney for the government argued before Judge Cushman and argues here that the language quoted in this proviso is broad enough to prohibit the hauling of any cars in revenue trains upon which there may be any penalty defect; this notwithstanding the language in the proviso is clear and is confined only to such hauling "of defective cars by means of chains instead of drawbars."

There is no justification for the taking up of space herein, or the time of this court, to state elementary principles of statutory construction or to cite cases in support of the rule, that courts will not read something into a statute which is already clear, definite and complete, and this contention presents a situation concerning which it is difficult to understand the basis upon which the responsible

heads of the safety department of our government have been led to authorize a re-presentation of this question. Our justification for making this observation is placed upon two grounds:

1. Full consideration has been given to such contention of the attorneys for the government, in appeals of similar cases, with the result that upon clear reasoning and by the application of elementary principles of statutory construction the same have been, upon consideration of the clear language of the act, swept aside.

2. Such construction, if the language used was in doubt, would not be given to this provision in view of the nonsensical result.

The evidence in this case shows that on a box car there could be about 200 penalty defects, (Rec. p. 267) the great majority of which have little, if anything to do with safety until the car actually reaches a terminal. In the great majority of cases these defects originate out on the line between terminals with cars under load, and most frequently are cases of bent or broken steps and handholds, some defects in the numerous contrivances in connection with the automatic feature of the coupling apparatus, on the brake wheel, brake rod, or on account of the drawbar being too low or too high, and until a car with such a defect reaches a terminal there is little, if any, likelihood of use being

made of any of such defective parts, and we do not believe that the responsible heads having the administration of the Safety Appliance work on behalf of the government would say that such defects should require the car so under load to be set out and left on a siding for an engine to take in, or left until a sufficient number of cars had been set out along the line as to justify the making up of a train of penalty defect cars. On the other hand, there are strong reasons for not permitting chained cars to be moved in connection with other cars moving commercially, and the inhibition in this proviso is only as to such cars.

Even prior to the passage of this 1910 Amendment many of the courts had held that a car becoming defective out on the road and under load could be brought in to the first terminal and some courts since the passage of the amendment have pointed out that it merely enacts in statutory form the rights the carrier had prior thereto. The government has not cited any case other than what is printed as an unpublished opinion of Justice Clark, when a district judge, admittedly reversed by the Circuit Court of Appeals for the Sixth Circuit, but as we have stated the courts have considered similar contentions.

In the case of *U. S. vs. Erie Railroad Co.*, 237 U. S. 402; 59 Law Ed. 1019, there was before the

Supreme Court a case involving eight violations. In two of the cases the drawbars were so inoperative that it was necessary to chain the cars together; the other six defects were of a less serious character.

The District Court and the Circuit Court of Appeals disposed of all eight counts adversely to the contention of the government upon the ground that all eight cars were merely taken from one yard of the defendant to another of its yards only a few miles distant, and this did not constitute a road movement, although all eight cars moved in a commercial train.

The judgments of both courts was reversed by the Supreme Court, it finding under the evidence that as to the six cars containing only minor defects they could and should have been repaired in the first yard, and that the movement thereafter was a road movement, and that as to the two cars containing defective drawbars, the proviso being discussed, made it unlawful to transport such cars in a revenue train.

In this opinion Justice VanDevanter quotes from the proviso prohibiting the handling of cars, in commercial service, when they are coupled with chains, as covering the entire scope of the proviso and clearly, by inference, interprets this exception as applying only to cars so attempted to be hauled.

In *Galveston, etc., Ry. Co. vs. U. S.*, 199 Fed.

891, the Circuit Court of Appeals for the Fifth Circuit, expresses the views of some of the authorities prior to the passage of the 1910 Amendment and holds that under the amendment there can be no doubt as to the right of the carrier to haul in revenue trains cars becoming defective on its system to the nearest, most available, repair point.

In *Erie Ry. Co. vs. U. S.*, 240 Fed. 28, the Circuit Court of Appeals for the Sixth Circuit, gave full consideration to this same contention holding that under the plain terms of the proviso there was no merit in the government's contention. This case was followed by the same court in an opinion written by *Justice Sanford* in the case of the *B. & O. S. W. R. Co. vs. U. S.*, 242 Fed. 420.

See also

Denver & R. G. Ry. Co. vs. U. S., 249 Fed. 822 (C. C. A. 8).

A consideration of the foregoing authorities renders a further discussion of each of the assignments raising this question unnecessary.

COUNT EIGHTEEN.

Assignments of Error 33, 34 and 35 have to do with the refusal of the court to direct a verdict for the government as to Count Eighteen, and

to its action in a direction of a verdict for the defendant.

This count covered a car which the two government inspectors testified was found on an interchange track used by the Northern Pacific to interchange cars with the Great Northern, they testifying that the drawbar was a fraction too low.

The court, upon motion of defendant, directed a verdict in its favor as to this count.

This interchange track was constructed pursuant to a franchise granted by the City of Seattle within Whatcom Avenue, sometimes called Railroad Avenue, a public street running along the water front of the City of Seattle. The portion of the street between the track and the one block of land separating the street from the Bay being paved, and one of the most heavily traveled streets in the City of Seattle, and abutting thereon, on the block intervening between the westerly side thereof and Elliott Bay are many industrial concerns. (Rec. p. 228-9, Weeks p. 170-1.)

All that was done with this car was to move it, with other cars on either side which had been delivered by the Great Northern on this track, to the end of the track and over a switch and into the yards of this respondent.

Inspector Weeks, one of the government inspectors, testifying in the government's case that

this, with other cars, was set upon this interchange by the Great Northern, and that the track was in a street on the paved part of which there was heavy traffic, testified:

“Q. You found a car on either side of this one?

A. Yes, sir; two cars.

Q. Was there any other way that the Northern Pacific could get this car into its yards than the way they did?

A. No, I don't think so.

Q. They did not haul it any further than they had to haul it to get it into their yard, did they, Weeks?

A. No, I would not think so.” (Rec. p. 172.)

R. M. Crosby, Mechanical Superintendent, referring to the situation along this track testified:

“Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue having the standpoint of safety of the men and the safety of the equipment and the property in mind?

A. No, I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself.” (Rec. p. 201.)

Superintendent McCullough, who had charge of all terminal switching testified that it would be very

unsafe, in any event, to place men on this transfer track at this time unless the men doing the work were heavily guarded and that it was not until a considerable time later that he even permitted inspectors to go out along this street. (Rec. p. 229.)

The railway company, as a matter of law, could not have used this interchange track so located in a public street for repair purposes. Such purpose would be entirely inconsistent with its franchise grant and with the rights of the public to a joint use of the street. However, irrespective of this question, even if it had such a right, the situation at the time was such, on account of the shopmen's strike, as would have made it a real offense if it had endeavored to do so on account of a situation, in connection with which any undue excitement would not only endanger the company's property, but, undoubtedly, the lives of many innocent people. (Rec. pp. 201, 229.)

It was then a question of either taking this car into the yard over the switch from this interchange track and leaving it there, or taking it into the yard, switching it around until the car on either side had been detached therefrom, then setting it back on the interchange so that the Great Northern could take it and haul it back to its yard several miles distant and necessitating a haul along the entire water front of Seattle. The situation was acute

and certainly the incidental handling necessary by reason of the situation both as to the right to so use the interchange track and the surrounding conditions was not such a handling as was prohibited by any reasonable interpretation of the Safety Appliance Act.

Judge Cushman, in passing upon this, the most inadvised of all the counts, could not, without stultifying himself and the law which these inspectors were supposed to see was obeyed, do other, under the evidence, than to direct a verdict.

No court has ever held that such an incidental handling of a car was in violation of the terms of this act, and we can not better answer the contentions of the government in this regard than to quote the language of *Justice Sanford* in the opinion rendered by him for the Circuit Court of Appeals for the Sixth Circuit, in the case of *Baltimore, etc., Ry. Co. vs. U. S.*, 242 Fed. 420, in which opinion Justice Sanford said:

“We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the

Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof."

OTHER INSTRUCTIONS.

There are some few technical objections made to some other instructions that are discussed, all of which we have discussed in connection with the consideration of the pleadings and strike issue first discussed in this brief.

It is unnecessary to suggest that there is no theory upon which the defendant in error could be held liable if, after said train had been made ready to start it had been maliciously interfered with by third parties.

CONCLUSION.

We are fearful that the foregoing brief is more lengthy than reasonably necessary. We ask the indulgence of the court in connection with the extensive quotations we have made from the instructions and the evidence, and we have quoted only to such extent with the view of being of assistance to the court in considering the numerous, highly technical objections as made and the many argumentative suggestions based upon incomplete excerpts or references to the record.

Not only was there positive evidence that the defects complained of did not exist when the cars actually started on the road movement, from the several witnesses produced by the defendant, but there is documentary evidence in the record which, as stated by counsel for appellant in his brief, should show from the trainmen any defects, if any existed, while the train was out on the road.

We do not view the evidence of the two government inspectors in much different light than did the jury.

Superintendent McCullough, at the request of counsel for the government, drew upon the blackboard an outline of the trackage over which the three trains referred to in the evidence departed from the Auburn yard. The witness Winter places his inspection of certain of these cars at a certain hour (Rec. pp. 76, 84, 91), and the witness Weeks says that he had left the cars an hour prior thereto (Rec. pp. 146-7), although the witness Winter says that Weeks was with him when the inspection was made (Rec. p. 76). The three trains at Auburn moved out within a period of a very few minutes of each other (Rec. p. 84) and over leads one of which was over two miles from the other two (Rec. p. 282). I do not say that these two government witnesses did not believe that these cars were defective, but the jury had a right to believe that they were not

defective when actually moved, and this court is not, in our opinion, going to say that the jury should not have believed the defendant's testimony.

There is nothing in this case, in our opinion, other than disputed questions of fact. The law was fairly given to the jury, and the government had a fair trial. It apparently did not consider any serious error was made in the instructions given and refused, as no application was made for a new trial and no attempt made to argue before the learned District Judge the many technical errors now assigned.

Respectfully submitted,

GEO. T. REID,

C. H. WINDERS.

Attorneys for Defendant in Error.

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United States
Circuit Court of Appeals
For the Ninth Circuit.

TWOHY BROTHERS COMPANY, a Corporation,
Plaintiff in Error,

vs.

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of the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

PAUL G. McIVER, Esq., Phoenix, Arizona,
SAMUEL WHITE, Esq., Phoenix, Arizona,
Messrs. BULLARD & JACOBS, Phoenix, Arizona,
Attorneys for Plaintiff in Error.
FRED C. BOLEN, Esq., Phoenix, Arizona,
SPENCER B. PUGH, Esq., Phoenix, Arizona,
Attorneys for Defendant in Error.

In the Superior Court of the State of Arizona in
and for the County of Maricopa.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendants.

Complaint.

Now comes the plaintiff and for a cause of action
against the defendant, complains and alleges:

I.

That defendant is now, and was at the time
and times hereinafter mentioned, a corporation duly
incorporated under the laws of the State of Arizona,
and doing business as such corporation in the
county of Maricopa and State aforesaid.

II.

That the plaintiff is a resident of the County of Maricopa, and was at the times hereinafter mentioned a resident of said count and State.

III.

That defendant company was, at the times hereinafter mentioned, engaged in the construction and building of public highways in the County of Maricopa, to wit; That certain portion of the public highway known as the Indian-School Road and at a point about three miles east of what is known as the "West End Store," and being situate at an (1) approximate distance of about twelve miles, more or less, west of the city of Phoenix, county of Maricopa, State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, plaintiff was an employee of said defendant company; that plaintiff's daily duties of said employment with said defendant company were to assist in connecting and making fast what is called and known in said business a bale, to cars or [1*] buckets loaded with sand, gravel and cement, and to assist in guiding said bale and holding same in its proper place and position while said sand, gravel and cement, was being unloaded into what is known and called a skiff, and used for the conveyance of said sand, gravel and cement, to what is known and called the mixer.

V.

That on or about the 25th day of March, 1921,

*Page-number appearing at foot of page of original certified Transcript of Record.

and while plaintiff was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without any fault, carelessness or negligence whatever upon the part of the plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; It did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway, as aforesaid; that plaintiff was compelled to, in the performance of his regular duties and employment, as aforesaid, to push, haul and pull upon said bale, as to then and there, and at said time and place, receive great and severe bodily strain and internal injuries, to wit; a sprained back, a dislocation of the fifth lumbar vertebra, and a severe rupture and hemorrhoids.

VI.

That by reason of the said injuries so received (2) as aforesaid, plaintiff has suffered and now does suffer extreme bodily pain; That prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries, and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain and anguish, and that he has been and now is unable to engage in any occupation to earn a livelihood whatsoever, and will forever remain maimed and crippled, and thereby incurring great loss and damage to the plaintiff in the sum of Ten Thousand Dollars (\$10,000). That by reason and

on [2] account of said injuries, as aforesaid, plaintiff has been further damaged in the sum of \$200.00 expended for medical services and treatment, such services and treatment being necessary for the relief of the pain and bodily suffering caused by said injuries; that plaintiff has been damaged by reason of the extreme physical pain, suffering and mental anguish due to said injuries. That by reason of said injuries so received, as aforesaid, plaintiff has been permanently injured and forever hindered from following his usual vocation and from engaging in any means of livelihood, to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the defendant company in the sum of \$20,000.00 and for his costs herein incurred.

FRED C. BOLEN,

Attorney for Plaintiff.

Plaintiff's Exhibit No. 1, admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274, for Identification. Deft's. Ex. 1 for Identification, May 22, 1923.

[Endorsed]: No. 14149. Filed Apr. 23, 1921. Claude S. Berryman, Clerk. By Angie P. Byrne, Deputy. [3]

In the Superior Court of Maricopa County, State of
Arizona.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Summons.

The State of Arizona to Twohy Bros. Company, a
Corporation, Defendant, GREETING:

YOU ARE HEREBY SUMMONED and required
to appear in an action brought against you by the
above-named plaintiff in the Superior Court of Mari-
copa County, State of Arizona, and answer the com-
plaint therein filed with the Clerk of said Court, at
Phoenix, in said county, within twenty days after
the service upon you of this summons, if served in
this said county, or in all other cases within thirty
days thereafter, the times above-mentioned being
exclusive of the day of service, or judgment by de-
fault will be taken against you.

Given under my hand and the seal of the Superior
Court of Maricopa County, State of Arizona, this
23d day of April, 1921.

[Seal]

CLAUDE S. BERRYMAN,
Cerk of said Superior Court.
By W. H. Linville,
Deputy Clerk.

Filed Apr. 30, 1921. Endorsed: No. 14149.
Claude S. Berryman, Clerk. By Angie P. Byrne,
Deputy.

State of Arizona,
County of Maricopa,—ss.

I HEREBY CERTIFY that I received the within
summons on the 25 day of Apr., A. D. 1921, at the
hour of 10:10 A. M., and personally served the same
on the 25 day of Apr., A. D. 1921, Twohy Bros. Co.,
a Corp., being the same defendant named in said
summons, by delivering to Geo. P. Bullard, State
agent of said corporation in the County of Mari-
copa, a copy of said summons, to which was at-
tached a true copy of the complaint mentioned in
said summons.

Dated this 25 day of April, A. D. 1921.

Fees, service	\$—
Copies	\$1.00
Travel — miles	\$.20
Publication	\$—
<hr/>	
Total	\$1.20

JOHN MONTGOMERY,

Sheriff,

By Ernest A. Smith,

Deputy Sheriff.

[Endorsed]: No. 14149. Superior Court of Mari-
copa County, State of Arizona. Walter Rogers,
Plaintiff, vs. Twohy Bros. Company, a Corporation,
Defendant. Summons. Filed Apr. 30, 1921. Claude

S. Berryman, Clerk. By Angie P. Byrne, Deputy Clerk. Fred C. Bolen, Attorney for Plaintiff.

Received.

JOHN MONTGOMERY,

Sheriff,

By _____,

Deputy Sheriff.

1:30 P. M., Apr. 25, 1921. [4]

In the Superior Court of Maricopa County, State of Arizona.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Petition for Removal to Federal Court.

To the Honorable Superior Court of Maricopa County, State of Arizona;

Comes now the defendant, Twohy Brothers Company, a corporation, and by this petition respectfully shows to this Honorable Court;

That your petitioner is the defendant in the above-entitled action;

That said action has been commenced against defendant in said court by plaintiff, and that action is of a civil nature;

Said plaintiff in this complaint herein complains, in substance, that on the 25th day of March, 1921,

said plaintiff was in the employ of said defendant and that while in the employ of said defendant on said date, plaintiff was injured in his back, and sustained hemorrhoids and a rupture; that said accident was caused by the negligence of this defendant; and is brought under what is commonly known as the Common Law, and for which said plaintiff demands judgment in the sum of Twenty Thousand Dollars (\$20,000.00);

That said petitioner disputes said claim and denies all liability of the cause of action set out in the complaint herein; that the matter in dispute in this action exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs; that the controversy in this action and every issue of (1) fact involved therein is wholly between citizens of different states, and which can be fully determined as between them; that is to say, the plaintiff, Walter Rodgers, is now, and was at the time of the filing of the complaint in this action, a [5] citizen and resident of the State of Arizona, and the defendant, Twohy Brothers Company, a corporation, was then and still is a citizen and resident of the State of Oregon;

That the time for your petitioner and defendant in this action to answer or plead to the complaint in such action has not yet expired and will not so expire until the 14th day of May, 1921, and your petitioner has not yet filed any pleadings or in any way appeared therein;

Your petitioner herewith presents a good and sufficient bond, as provided by the statutes in such cases, that they will enter into the United States

District Court of the District of Arizona, within thirty days from the filing of this petition, a certified copy of the record in this suit and for the payment of costs which may be awarded by the said Court, if the said District Court shall hold that this suit was wrongfully or improperly removed thereto;

Your petitioner, therefore, prays that this suit proceed no further herein, except to make the order of removal as required by law and to accept the bond herewith and direct a transcript of record herein to be made for said Court, as provided by law.

PAUL G. McIVER,
Attorney for Defendant.

State of Arizona,
County of Maricopa,—ss.

John Twohy, being first duly sworn, deposes and says that he is president of the Twohy Brothers Company, a corporation, the defendant in the above-entitled action, and that he has read the foregoing petition, and that the same is true of his own knowledge except as to such matters as are therein stated on information and belief, and as to such matters, he verily believes it to be true.

JOHN TWOHY.

Subscribed and sworn to before me this 9th day of May, 1921.

[Notary Seal]

E. P. WISE,
Notary Public.

My commission expires Nov. 23, 1924. [6]

In the Superior Court of Maricopa County, State of
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Notice of Petition and Bond for Order of Removal.

To Walter Rodgers, plaintiff, and Fred C. Bolen, his
attorney:

You and each of you will please take notice that the defendant in the above-entitled action will, by its attorney, Paul G. McIver, on the 13th day of May, A. D. 1921, at the hour of 9:30 o'clock, or as soon thereafter as counsel may be heard, move the Court for an order removing said cause to the District Court of the United States for the District of Arizona, in accordance with the petition and bond of the defendant, copies of which are hereto attached.

PAUL G. McIVER,
Attorney for Defendant.

Received copy of within papers 5-9-21.

FRED C. BOLEN,
Atty. for Pltf.

[Endorsed]: No. 14149. Filed May 9, 1921.
Claude S. Berryman, Clerk. By Angie P. Byrne,
Deputy. [7]

In the Superior Court of Maricopa County, State of
Arizona, Division No. 1.

Court convened at 9:30 A. M., Wednesday, May
11, 1921.

Present: R. C. STANFORD, Judge; Claude S. Ber-
ryman, Clerk; the Sheriff; the County Attorney
and the Court Reporter.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS., a Corporation,

Defendants.

**Minutes of Court—May 11, 1921—Order Withdraw-
ing Original Bond.**

Comes now Paul G. McIver, counsel for the de-
fendant, and thereupon, it is ordered by the Court
that the defendant be allowed to withdraw the
original bond and substitute a new one therefor.

[8]

MARYLAND CASUALTY COMPANY,
BALTIMORE.

BOND.

In the Superior Court of Maricopa County, State of
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Bond on Removal.

Know All Men by These Presents:

That we, Twohy Brothers Company, a corporation as principal, and the Maryland Casualty Company, as surety, are held and firmly bound unto Walter Rodgers in the sum of Five Hundred Dollars (\$500.00), lawful money of the United States of America, for the payment of which to be well and truly made, we, and each of us, bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

CONDITIONED, nevertheless, that;

WHEREAS, the said Twohy Brothers Company, a corporation, has applied to the Superior Court of the State of Arizona, in and for the County of Maricopa, for the removal of the cause pending therein, wherein the said Walter Rodgers is plain-

tiff and the said Twohy Brothers Company, a corporation, is defendant, to the United States District Court, for the District of Arizona, sitting in the City of Phoenix, in the said District and State, and that all further proceedings in said action in said State Court be stayed;

NOW, THEREFORE, if your petitioner shall file in the United States District Court for the District of Arizona, within thirty days from the filing of this petition for removal, a certified copy of the record of this suit, as required by law, and shall pay as costs to be paid, all costs that may be awarded therein by the said United States District Court, if said Court shall hold that the said suit was improperly or wrongfully removed thereto, then this obligation to be void; otherwise, to be and remain in full force and effect.

Dated this 7th day of May, A. D. 1921.

TWOHY BROTHERS COMPANY,

A Corporation.

By John Twohy,

President.

[Seal]

Twohy Brothers.

[Seal]

MARYLAND CASUALTY COMPANY.

MARYLAND CASUALTY COMPANY.

By W. H. THANSON,

Attorney in Fact.

Countersigned:

By FLOYD M. STAHL.

Attorney in Fact.

[Endorsed]: No. 14149. Filed May 11, 1921.
Claude S. Berryman, Clerk. By Angie P. Byrne,
Deputy.

Received copy this 11th day of May, 1921.

FRED C. BOLEN,
Atty. for Pltf. [9]

In the Superior Court of Maricopa County, State of
Arizona, Division No. 1.

Court convened at 9:30 A. M., Thursday, May 12,
1921.

Present: R. C. STANFORD, Judge; Claude S.
Berryman, Clerk; the Sheriff; the County At-
torney and the Court Reporter.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY,

Defendant.

**Minutes of Court—May 12, 1921—Petition for
Removal of Cause.**

This matter comes on regularly this day to be
heard upon the petition of the defendant for re-
moval of this cause to the District Court of the
United States for the District of Arizona, Fred C.
Bolen appearing as counsel for the plaintiff and Paul
G. McIver appearing as counsel for the defendant,
and the Court being fully advised in the premises

accepts the bond of the said defendant, and it appearing that this is a proper cause for removal to the District Court;

It is ordered that no further proceedings be had in this cause and the removal of the same to the District Court of the United States for the District of Arizona be and the same is allowed over the objections of the plaintiff, and,

It is ordered in accordance with the said petition for removal heretofore filed and the statute of the United States in such cases made and provided.
[10]

In the Superior Court of Maricopa County, State of
Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Order for Removal.

This cause coming on for hearing upon petition and bond of the defendant herein, for an order transferring this cause to the United States District Court in and for the District of Arizona, and it appearing to the Court that the defendant has filed his petition for said removal in due form of law, and that the defendant has filed his bond duly

conditioned with good and sufficient sureties, as provided by law; that defendant has given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal from the above court to the said District Court;

NOW THEREFORE, said petition and bond are hereby accepted and it is hereby ORDERED AND ADJUDGED that this cause be, and it hereby is, removed to the United States District Court for the District of Arizona, and the clerk is hereby directed to make the record in said cause for transmission to said court herewith.

Done in open court this 12th day of May, A. D. 1921.

R. C. STANFORD,
Judge.

Received copy of within,

FRED C. BOLEN.

[Endorsed]: No. 14149. Filed May 14, 1921.
Claude S. Berryman, Clerk. By Angie B. Byrne,
Deputy. [11]

In the Superior Court of Maricopa County, State
of Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-
tion,

Defendant.

Notice of Removal.

To Walter Rodgers, Plaintiff, and Fred C. Bolen,
His Attorney:

You, and each of you, will please take notice that on the 12th day of May, 1921, an order of Court duly made, a copy of which is hereto attached, the above-entitled cause was duly transferred from the Superior Court of the County of Maricopa, State of Arizona, to the District Court of the United States in and for the District of Arizona, and that the record in said cause has this day been filed in said United States District Court.

PAUL G. McIVER,
Attorney for Defendant.

Received copy of within.

FRED C. BOLEN.

[Endorsed]: No. 14149. Filed May 14, 1921.
Claude S. Berryman, Clerk. By Angie P. Byrne,
Deputy. [12]

In the Superior Court of Maricopa County, State
of Arizona.

No. 14149.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY,

Defendant.

Clerk's Certificate.

State of Arizona,
County of Maricopa,—ss.

I, Claude S. Berryman, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the above and foregoing to be a full, true and complete copy and transcript of the record including all the minute entries and all proceedings had and entered of record in a certain cause lately pending in said Superior Court wherein Walter Rodgers was plaintiff and Twohy Brothers Company, a corporation, was defendant, as the same remains of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Phoenix, in said county and State, this 20th day of May, 1921.

[Seal]

CLAUDE S. BERRYMAN.

By W. H. Linville,

Deputy Clerk.

Transcript delivered to Clerk United States District Court, District of Arizona, this — day of —, 1921.

Clerk Superior Court.

[Endorsed]: No. 14149. Copy Papers on Removal to United States District Court. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

No. L-274—(Phoenix). (1. Complaint. 2. Summons. 3. Petition for Removal. 4. Notice of Petition and Bond. 5. Bond on Removal. 6. Order for Removal. 7. Notice of Removal. 8. All minute Entries.) [13]

In the United States District Court in and for the
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

First Amended Complaint.

Now comes the plaintiff herein and for a cause of action against the defendant, complains and alleges:

I.

That plaintiff is a resident of Maricopa County, State of Arizona.

II.

That defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and doing business as such corporation in the county of Maricopa and State aforesaid.

III.

That said defendant company was, at the times

hereinafter mentioned, engaged in the building and construction of Public Highways in the county of Maricopa, to wit: That portion of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona. [14]

IV.

That on and prior to the 25th day of March, 1921, plaintiff herein was an employee of said defendant company; that plaintiff's duties of employment with said company, were in part, to assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one car or bucket attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement, to what is known and called in said business the "mixer." That plaintiff was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

V.

That on or about the 25th day of March, 1921,

and while plaintiff herein was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without fault, carelessness or negligence upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; It then and there so carelessly and negligently located and placed the machinery hereinbefore designated as the "bale," in Paragraph IV herein, as to require of this plaintiff in the regular performance of his duties, to push, to haul, and pull upon said bale then and there connected and attached to (2.) said car or bucket loaded with sand, gravel and cement, as aforesaid, and to use unnecessary and severe bodily strength and physical strain, to make and complete the required and necessary connection between said bale and said skiff that was so required for the unloading of said sand, gravel and cement into said skiff to be conveyed to the said mixer, as hereinbefore mentioned. That the improper location and adjustment of the said bale and [15] machinery at said time and place as aforesaid, was the direct and proximate cause of plaintiff then and there receiving great and severe bodily strain and severe internal injuries, to wit; a sprained back, a dislocation of the vertebra, a severe rupture and hemorrhoids.

VI.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date

of said injuries, to wit: the 25th day of March, 1921, plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain, and that he has been and now is unable to engage in any occupation to earn a livelihood, and will forever be maimed and crippled thereby incurring great loss and damage to this plaintiff in the sum of Ten Thousand Dollars (\$10,000.00).

That by reason and on account of said injuries, as aforesaid, this plaintiff has been further damaged in the sum of Five Hundred Dollars (\$500.00) expended for medical services, nursing and treatment, said medical services, (3.) nursing and treatment being required and necessary for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, this plaintiff has been permanently injured and forever hindered from following his usual vocation to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

1.

(Stamped: Defendant's Exhibit No. 2, for Identification. Admitted and Filed May 23, 1923. Case No. L-274—(Phoenix). C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk). Defts. Ex. 2, for Identification. May 22, 1923. [16]

Comes now the above-named plaintiff, Walter Rogers, by his attorney, and for a second and further cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and State aforesaid.

III.

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was (4) and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used and operated in the building and construction of Public Highways in the county of Maricopa, to wit: that portion of

the Public Highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in [17] connecting and making fast what is known and called in said business the "bale," to cars and buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement, to and into, what is known as and called in said business the "mixer," that plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described. (5.)

V.

That said occupation in which said plaintiff, Walter Rogers, was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted, and that said occupation was hazardous in fact.

VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service ad employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in [18] Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe (6.) bodily and physical strain, to wit: pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit, a sprained back, slight dislocation of the vertebra, a severe rupture and hemorrhoids.

VII.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and on account of said accident and injuries, as aforesaid, plaintiff has

been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, [19] nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: No. L-274 — (Phoenix). First Amended Complaint. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Received copy of within complaint this — day of May, 1921. Paul G. McIver, Att. for Defendant Company. [20]

In the District Court of the United States in and
for the District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

**Demurrer and Answer to Plaintiff's First Cause of
Action and Motion to Strike, Demurrer and
Answer to Plaintiff's Second Cause of Action.**

COMES NOW the defendant herein and answering the first cause of action of plaintiff's first amended complaint demurs thereto upon the following grounds:

I.

That the said cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays judgment of this Court that plaintiff take nothing by his said first cause of action and that defendant may go hence with its costs.

PAUL G. McIVER,
Atty. for Deft.

Should said demurrer be overruled but without waiving the same, defendant further answering the said first cause of action of plaintiff's first amended complaint, admits, denies and alleges as follows, to wit:

I.

Defendant denies both generally and specifically, all and singular, the allegations contained in the said first cause of action of plaintiff's first amended complaint.

II.

And further answering the said first cause of (1.) action of plaintiff's first amended complaint, defendant alleges that the injuries to plaintiff, if any there were, were caused by a risk incident in and necessary to said employment of plaintiff and that plaintiff entered, and continued in the employment of [21] the defendant with full knowledge of said risk, and the plaintiff thereby assumed the risk of said employment.

III.

Further answering, defendant alleges that the injuries of plaintiff, if any there were, were caused by plaintiff's own negligence, and that the proximate cause of plaintiff's injuries, if any there were, was the negligence of the plaintiff and that plaintiff's negligence contributed thereto.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by his said action and that defendant may go hence with its costs.

PAUL G. McIVER,
Attorney for Defendant.

Comes now the defendant and moves the Honorable Court to strike all of the second cause of action of plaintiff's first amended complaint, from the files, on the following grounds:

I.

That, heretofore, on the 21st day of April, 1921, in the Superior Court of the State of Arizona, in and for the county of Maricopa, the plaintiff filed his complaint in the above-entitled action, and that said complaint set up a cause of action under the Common Law. That the plaintiff by so filing his said complaint, elected to pursue his said remedy at Common Law, to the exclusion of all other remedies.

Wherefore, defendant prays that the said second cause of action of plaintiff's first amended complaint be stricken from the files herein and that said second (2.) cause of action be dismissed.

PAUL G. McIVER,
Attorney for *Plaintiff*. [22]

Should the above motion to strike be denied, but without waiving the same, defendant demurs to the said second cause of action of plaintiff's first amended complaint on the following grounds:

I.

That said second cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE defendant prays that plaintiff take nothing by his said amended complaint and that defendant may go hence with its costs.

PAUL G. McIVER,
Attorney for Defendant.

Further answering the said second cause of action of plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Defendant denies, both generally and specifically, all and singular, the allegations contained in said second cause of action of plaintiff's first amended complaint.

II.

Defendant alleges that the injuries of plaintiff, if any there were, were caused solely by the negligence of the said plaintiff.

Wherefore, defendant prays that plaintiff take nothing by his said action and for costs.

PAUL G. McIVER,
Attorney for Defendant.

[Endorsed]: Answer, Demurrer, and Motion to Strike. Received Copy 6-17-21, Fred C. Bolen, Atty. for Pltf.

Filed June 17, 1921. C. R. McFall, Clerk. By Patrick D. Madden, Deputy Clerk. [23]

Regular May Term 1921—at Tucson.

In the United States District Court, in and for
the District of Arizona.

Honorable WILLIAM H. SAWTELLE, United
States District Judge, Presiding.

(Minute Entry of October 17, 1921.)

No. L-274—(PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS (a Corporation),

Defendant.

Minutes of Court—October 17, 1921—Order Granting Plaintiff Leave to Amend Complaint.

ORDERED, that the plaintiff be and is hereby granted leave to amend his complaint as of May 21st, 1921, by adding the second cause of action under the Employer's Liability Law of Arizona, and that the defendant's motion to strike said second cause of action from the files be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's demurrer to said second cause of action be and the same is hereby overruled. Plaintiff's counsel stated in argument that if the Court allowed the amendment to the complaint by adding thereto the said second cause of action, plaintiff would elect to proceed to trial on said second cause of action.
[24]

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Notice of Motion for Leave to Amend.

To Twohy Bros. Company. Messrs. Bullard & Jacobs, and McIver, Esqs., Their Attorneys:

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 14th day of December, 1921, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his first amended complaint herein, by the insertion of the following words, to wit:

Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injury to the blood vessels, nerves, muscles and ligaments adjacent thereto, also— After the word—to wit; on line four, of page four, and the insertion of the following words, *about without experiencing severe bodily fatigue*; After the word walk, on line seventeen, of page four thereof, and for such other and further relief as may be just.

FRED C. BOLEN,
Attorney for Plaintiff.

Dated this 14th day of December. 1921. [25]

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Motion for Leave to Amend.

Comes now the plaintiff, in the above-entitled cause, by his attorney, Fred C. Bolen, and moves this Court for an order for leave to amend his first amended complaint on file herein by the insertion of the following words, to wit:

Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—
After the word to wit; on line four, of page four.
And leave to insert the following words, to wit; about without experiencing severe bodily fatigue;
After the word walk, on line seventeen, of page four thereof.

FRED C. BOLEN,
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [26]

In the United States District Court in and for the
District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Affidavit of Fred C. Bolen.

Fred C. Bolen, being first duly sworn, deposes and says: that he is the attorney for the plaintiff, Walter Rogers, in the above-entitled action, that he is more familiar with the matters herein stated than said plaintiff and makes this affidavit for and in his behalf; that said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant company, on the 21st day of May, 1921, and is brought for the purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rogers, while in the service and employ of the said defendant company. That issue has been joined and the cause is now upon the calendar of this Court awaiting trial.

That it becomes necessary for the plaintiff to file an amended complaint in this action, for the following reasons, to wit:

That on or about the 3d day of November, 1921, and upon the application filed in this court by said

defendant company, and under and by virtue of Chapter 131, of the Session Laws of Arizona, 1921, 'authorizing and empowering Courts in personal injury cases to order and direct a physical examination (1.) of the person injured, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rogers, [27] on behalf of the defendant, Two Bros. Company. That on the 25th day of November, 1921, said examination was had and X-ray photos made of plaintiff's alleged injuries. That the said X-ray photos so taken of the plaintiff's "Vertebral Column," have enabled affiant to more specifically set forth in the proposed second amended complaint the injuries alleged to have been so received by said plaintiff.

That the plaintiff and this affiant was ignorant of the facts as herein stated when his former complaint herein was filed in this court.

FRED C. BOLEN.

Subscribed and sworn to before me this 14th day of December, 1921.

[Notarial Seal] SPENCER B. PUGH,
Notary Public.

My commission expires 10-30-1922.

[Stamped: Plaintiff's Exhibit No. 4. Admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274.] [28]

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Second Amended Complaint.

Comes now the above-named plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the County of Maricopa, and State aforesaid.

III.

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being

used to operate the machinery and appliances in and about said plant, which said plant was then and there to wit; on the 25th day of March, 1921, being used and operated in the building and construction of public highways in (1.) the county of Maricopa, to wit; That portion of the public highway known as the Indian Road and at a point about three miles east of what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona. [29]

IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there

used to convey said sand, gravel and cement, to and into, what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

V.

That the said occupation in which said plaintiff Walter Rogers, was employed at said time and place, as aforesaid (2.) was hazardous as declared and determined by subdivision (10), of Section 3156. Chapter VI, Civil Code of Arizona," under which this action is instituted, and that said occupation was hazardous in fact.

VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment. [30]

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and

complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon (3.) said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit; severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also rupture and hemorrhoids.

VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without experiencing severe bodily fatigue; that ever since the date of said

accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, [31] and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his (4.) usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: No. L-274. Second Amended Complaint. Received Copy of Within this — day of December, 1921. G. P. Bullard, Attorney for Defendant.

Filed Dec. 12, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Stamped: Ptf's Exhibit No. 3, for Identification. Admitted and Filed May 23, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. Case No. L-274. Deft's Ex. 3 for Identification. May 22, 1923.] [32]

In the District Court of the United States in and
for the District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-
tion,

Defendant.

**Motion to Strike Demurrer and Answer to Plain-
tiff's Second Amended Complaint.**

Comes now the defendant and moves the Honorable Court to strike all of the plaintiff's second amended complaint from the files, on the following grounds:

I.

That, heretofore, on the 21st day of April, 1921, in the Superior Court of the State of Arizona, in and for the county of Maricopa, the plaintiff filed his complaint in the above-entitled action, and that said complaint set up a cause of action under the Common Law. And that at said time, plaintiff failed to file any cause of action under the Employer's Liability Law of the State of Arizona. That

the plaintiff by so filing his said complaint, elected to pursue his said remedy at Common Law, to the exclusion of all other remedies.

Wherefore, defendant prays that the said second amended complaint, setting up a cause of action under the Employer's Liability Law of the State of Arizona, be stricken from the files and that defendant go hence with its costs.

PAUL G. McIVER,
BULLARD & JACOBS,
Attorneys for Defendant.

Should the above motion to strike be denied, but , [33] without waiving the same, defendant demurs to the said second amended complaint, on the following grounds:

I.

That said second cause of action does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant prays that plaintiff take nothing by his said second amended complaint and that defendant may go hence with its costs.

PAUL G. McIVER,
BULLARD & JACOBS,
Attorneys for Defendant.

Further answering the said second amended complaint, defendant admits, denies and alleges as follows:

I.

Defendant denies, both generally and specifically, all and singular, the allegations contained in plaintiff's second amended complaint.

II.

Defendant alleges that the injuries of plaintiff, if any there were, were caused solely by the negligence of the said plaintiff.

WHEREFORE, defendant prays that plaintiff take nothing by his said second amended complaint, and that defendant may go hence with its costs.

PAUL G. McIVER,
BULLARD & JACOBS,
Attorneys for Defendant.

[Endorsed]: L-274. Answer to Second Amended Complaint. Rec'd Copy, this 20 day of December, 1921. Fred C. Bolen. By Thos. J. Croaff, Attorney for Pltf.

Filed Dec. 20, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [34]

In the United States District Court in and for the
District of Arizona.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Affidavit for Leave to Amend.

Fred C. Bolen, being first duly sworn, deposes and says: That he is the attorney for the plaintiff, Walter Rodgers, in the above-entitled action; that he is more familiar with the matters herein stated

than said plaintiff and makes this affidavit for and in his behalf. That said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant company on the 21st day of May, 1921, and is brought for the purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rogers, while in the service and employment of the said defendant company; that issue has been joined and the cause is now upon the calendar of this court awaiting trial. That it is necessary for the plaintiff to file further amended pleading in this action for the following reasons, to wit:

First. That because of the time elapsed since the date of the alleged injury, to wit, March 25th, 1921, and the further time that will necessarily elapse before trial can be had in the premises it will be necessary for plaintiff to amend his second amended complaint now on file in said cause more particularly with reference to plaintiff's physical condition.

Second. That since the date of filing plaintiff's second amended complaint, to wit, the 12th day of December, 1921, [35] examination has been had of the machinery and appliances in and about the premises of the defendant company, wherein plaintiff received said alleged injuries; that as a result of said examination so had plaintiff will be enabled to more particularly set forth and allege his allegations relative to the alleged accident, said allega-

tions being now absent in the second amended complaint on file in said cause.

Third. That on the 3d day of November, 1921, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rodgers, on behalf of the defendant, Twohy Brothers Company; that on the 25th day of November, 1921, said examination was had and X-ray photos made of the plaintiff's alleged injuries; that thereafter and since the filing of plaintiff's second amended complaint, to wit, the 12th day of December, 1921, further physical examination have been made of the plaintiff, Walter Rodgers, by Dr. Win Wylie and by Dr. W. O. Sweek, of Phoenix, Arizona; that because of said physical examination so had by said Dr. Coit Hughes, Dr. Win Wylie and Dr. W. O. Sweek, and because of said X-ray photos so made disclosing plaintiff's alleged injuries and the physical condition of the plaintiff arising out of said alleged accident plaintiff is advised and so believes that the amount of damages as prayed for in his second amended complaint is wholly inadequate in the premises.

That the plaintiff and this affiant was ignorant of the facts as herein stated when his second amended complaint herein was filed in this court.

FRED C. BOLEN.

Subscribed and sworn to before me this 17th day of July, 1922.

[Seal]

J. B. WOODWARD,
Notary Public.

My commission expires the 16th day of February, 1924.

[Endorsed]: No. L-274. Affidavit for leave to Amend. Filed July 17, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk.

Received copy of within this 17 day of July, 1922.

PAUL G. McIVER,

Atty. for Deft. [36]

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

**Notice of Motion for Leave to Amend Second
Amended Complaint.**

To Twohy Bros. Company, Messrs. Bullard and
Jacobs, and McIver, Esqs., Their Attorneys.

You, and each of you, will please take notice that upon the files and records in this action, the undersigned will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 15th day of July, 1922, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard,

for an order for leave to amend his second amended complaint.

FRED C. BOLEN,
Attorney for Plaintiff.

Dated this 14th day of July, 1922.

Filed July 15, 1922. C. R. McFall, Clerk. [37]

In the United States District Court in and for the
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Third Amended Complaint.

Comes now the above-named plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a Corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, State of Arizona; that the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and State of Arizona.

II.

That on and prior to the 25th day of March, 1921, said defendant company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used and operated in the building and construction of public highways (1) in the County of Maricopa, viz: That certain public highway known as and called the Indian Road and at a point approximately twelve miles, more or less, in a westerly direction from the City of Phoenix in the County of Maricopa and State of Arizona. [38]

III.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment were in part to connect and assist in connecting and making fast thereto what is known as and called in said business the "bale," to what is known as and called cars or buckets, said cars or buckets being then and there loaded with sand, gravel and cement, and to assist in guiding and holding said bale with said car or bucket attached thereto in its place and position while said car or bucket was then and there being lifted by said bale and being unloaded of said sand, gravel and cement into what is known

as and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement to and into what is known as and called the cement mixer. That plaintiff herein was so engaged in such duties of employment at the time of the accident and injuries hereinafter set forth and described.

IV.

That said occupation in which this plaintiff was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision Ten (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted and that said occupation was hazardous in fact.

V.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employment and service of said defendant company, and while he was then and there so engaged in and about the performance of his regular duties of employment in and about said plant, machinery and appliances, as aforesaid, plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising [39] out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul and pull upon said bale and while said bale was then and there attached to said car or bucket loaded with said sand, gravel and cement

as hereinbefore set forth and described and to use severe bodily strength and physical strain to make and complete the required and necessary connection between the said bale and the said skiff that was so required in the operation of unloading of said sand, gravel and cement from said car or bucket into the said skiff to be thereafter conveyed into the mixer.

That while so employed with his said duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon said bale with attached car or bucket loaded with sand, gravel and cement, as aforesaid, the accident occurred wherein plaintiff slipped and lost his footing causing plaintiff to fall. That by reason of said severe bodily and physical strain, slipping, loss of footing and fall, plaintiff sustained and suffered severe (3) injuries, to wit; Severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, together with rupture and hemorrhoids.

VI.

That by reason of said injuries so received, as aforesaid, plaintiff has suffered and now does suffer and will continue to suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed

the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without suffering severe bodily [40] fatigue, and will forever remain maimed and crippled. That by reason of and account of said accident and said injuries so received plaintiff has been compelled to expend and obligate himself in the sum of Five Hundred (\$500) Dollars, for medical services, nursing and treatment, said medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries. That by reason of and account of said injuries so received, plaintiff has been permanently injured and incapacitated from following his usual occupation and from earning the wages which he otherwise would have earned, to wit; Four to Five Dollars per day, all to his great damage in the premises in the sum of Twenty Thousand Five Hundred (\$20,500) Dollars.

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand Five Hundred Dollars (\$20,500.00), and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: No. L-274. Third Amended Complaint. Filed Dec. 12, 1922. C. R. McFall, Clerk. By Paul Dickason, Deputy Clerk.

Received copy of within this 14th day of July,
1922.

PAUL G. McIVER,
Attorney for Defendant. [41]

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

**Defendant's Objection to Plaintiff's Motion for
Leave to Amend.**

Comes now the defendant, by its attorneys, Paul G. McIver and Bullard & Jacobs, and objects to the filing of plaintiff's third amended complaint, and moves the Court that the said third amended complaint be stricken from the files for the following reasons:

I.

That the affidavit in support of plaintiff's motion for leave to amend is insufficient to warrant the court in granting said motion.

II.

That the proposed third amended complaint of plaintiff does not conform, and is not amended in accordance with the affidavit in support of plain-

tiff's motion, in the following particulars: That there is no amendment in plaintiff's third amended complaint concerning plaintiff's physical condition.

III.

That the only place wherein plaintiff's third amended complaint is a material amendment to plaintiff's second amended [42] complaint, is found in the last four lines on page three of the said third amended complaint, and there is no reason set forth in plaintiff's affidavit in support of his motion to amend for such amendment.

IV.

That the proposed third amended complaint of plaintiff is sham, false and untrue.

V.

Defendant further objects to the filing of said proposed third amended complaint, and for plaintiff's motion for leave to amend, on the ground that at the commencement of this action plaintiff elected, by filing his complaint in the Superior Court of the County of Maricopa, State of Arizona, under the common law, to pursue his said remedy under the common law, to the exclusion of all other remedies, and that plaintiff is bound by said election.

WHEREFORE, defendant prays that the proposed third amended complaint of plaintiff be not allowed, and if the same has been filed, that it be stricken from the files in this case.

PAUL G. McIVER,
BULLARD & JACOBS,
Attorneys for Defendant.

[Endorsed]: No. L—274. Defendant's objection to Plaintiff's Motion for Leave to Amend. Recd. Copy this 25th day of July, 1922. F. C. Bolen. T. J. C. Atty. for Pltf.

Filed July 25, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk. [43]

In the United States District Court in and for the
District of Arizona.

No. L—274.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

**Affidavit in Support of Defendant's Objection to
Plaintiff's Notice to Amend.**

State of Arizona,
County of Maricopa,—ss.

Paul G. McIver, first being duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and as such he is more familiar with the matters herein stated than defendant, and makes this affidavit in behalf of the above-named defendant; that he has made thorough investigations of the facts and evidence of the alleged accident set forth in plaintiff's second amended complaint, and that he has inter-

viewed numerous witnesses who were employed by the defendant company, and were fellow servants with the plaintiff in this action, and this affiant is informed by said witnesses and believes that the plaintiff at the time of the alleged accident, suffered no accident whatever; that he did not lose a footing while employed by the defendant company, particularly at the time alleged in [44] plaintiff's proposed third amended complaint, and that he did not fall.

Affiant further states that the allegations in plaintiff's proposed third amended complaint, found in the last four lines on page three of said third amended complaint, to his knowledge and belief are false and untrue.

PAUL G. McIVER.

Subscribed and sworn to before me this 24th day of July, A. D. 1922.

[Seal]

C. F. GERARD,
Notary Public.

My commission expires Jan. 17, 1924.

[Endorsed]: No. L—274. Affidavit in Support of Defendant's Objection to Plaintiff's Motion to Amend. Recd. Copy this 25 day of July, 1922. F. C. Bolen, Atty. for Pltf.

Filed July 25, 1922. C. R. McFall, Clerk. By P. D. Madden, Deputy Clerk. [45]

In the United States District Court in and for the
District of Arizona.

No. L-274—PHX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant,

Instructions Requested By Defendant. (1.)

I.

The plaintiff having failed to prove his case, you
are instructed to return a verdict for the defendant.

Given _____.

Refused F. C. JACOBS, Judge. (2.)

II.

The defendant in this case by its answer, denies
all of the allegations of plaintiff's complaint, and
denies that plaintiff was injured as alleged, or in-
jured at all, and alleges that if plaintiff was injured
to any extent, it was by reason of his own negli-
gence, and if you find from the evidence that the
plaintiff was guilty of negligence at the time he
sustained the alleged injuries, and if you find fur-
ther that such negligence was the proximate cause
of his alleged injuries, then your verdict must be
for the defendant.

Given _____.

Refused covered by other instructions

F. C. JACOBS,
Judge. (3.) [46]

III.

I charge you, that before the plaintiff can recover under the Arizona Employer's Liability Law, he must sustain by the evidence, that he was employed by the defendant in an occupation declared by said Employer's Liability Law to be hazardous, and that while engaged in the performance of the duties required of him he was injured, and that the injury was caused by an accident due to a condition or conditions of such employment and that it was not caused by his own negligence. Those are the burdens which the plaintiff must discharge and he cannot recover unless he proves by a preponderance of the evidence, each of the foregoing facts. If the plaintiff has failed to so prove any one of the above-mentioned facts, he has failed to establish his right of recovery and your verdict must be for the defendant.

Given _____.

Refused covered by other instructions

F. C. JACOBS,
Judge. (4.)

IV.

The first question for you to consider is whether or not it is established by the evidence that the plaintiff was at the time mentioned in the complaint, engaged in a hazardous occupation as defined by the Employer's Liability Law. If the plaintiff has failed to prove by a preponderance of the evidence that he was at said time engaged in an occupation declared to be hazardous, then he cannot recover and your verdict must be for the defendant.

I charge you further to consider whether or not the accident was due to a condition or conditions of the employment and if you find that the plaintiff has failed to prove by a preponderance of the evidence that the accident was due to a condition of employment, then he cannot recover.

Given _____.

Refused covered by other instructions

F. C. JACOBS,
Judge. (5.) [47]

V.

Before the plaintiff can recover under the terms of the Act, he must show that his injuries, if he was injured, were due to an accident arising out of and in the course of his employment in an occupation declared by the Act to be hazardous. The words "arising out of" refer to origin or cause of the injury, and the words "in the course of" refer to the time, place and circumstances under which the accident causing the injury occurred. Unless you find from the evidence in this case that the accident to the plaintiff, causing the injury, was one arising out of and in the course of his employment, and at the time of his injury, if he was injured, he was engaged in a hazardous occupation, your verdict must be for the defendant.

Given _____.

Refused partly covered by other instructions

F. C. JACOBS,
Judge. (6.)

VI.

If you find from the testimony that the plaintiff

at the time and place mentioned in the complaint, while engaged in the performance of his duties sustained the injury or injuries set up in the complaint, and that such injury or injuries were not caused by or were not the result of his negligence and were caused by an accident due to a condition or conditions of employment, then you will next consider the nature and extent of his injury or injuries so sustained, if any. In this connection the burden of proof is upon the plaintiff to show by a preponderance of the evidence, not only the material allegations of his complaint, but to prove in a like manner that the injuries, defects and afflictions of which he complains, or some of them of which he complains, are the proximate result of said accident, and, of course, plaintiff cannot recover for any injuries other than those which he has shown by a preponderance of the evidence to have been sustained at the time of the accident, or such as are reasonably certain to follow as a result of the accident. [48]

You are instructed that in order to justify a verdict for the plaintiff for damages for future consequences of the injury, the evidence must show with reasonable certainty that such consequences will follow. The fact that in the minds of the jurors the disability indicated may follow, or is likely to or will probably follow as a result of the injury will not warrant a verdict for such damages. Therefore, if the evidence goes no further than to indicate that some future consequences may or probably will

follow as a result of the injury, then you are not to award any damage for such future consequences.

Given

F. C. JACOBS,

Judge.

Refused _____ . (7.)

VII.

In the ascertainment of damage the law does not lay down any mathematical or definite rule. It says that you, the jury, must determine that matter and that in so doing that you must use sound judgment and good sense and make such an award as would be just compensation for the injury or injuries so sustained; no more and no less. You are not to give anything to the plaintiff because of his age or through sympathy, or because the defendant is a corporation, but you are to decide this case just the same as if it was an action between two individuals, and you are not to determine it, fix any damages or to give any damages at all by reason of the fact that the defendant is a corporation. In other words, you are to decide the case absolutely impartially, regardless of consequences, and whether it is pleasing to one side or the other. You are here to see that justice is done between these litigants, and when litigants cannot agree and go into court, then it is the duty of the court and jury to determine their controversy and to do justice between them as nearly as may be.

Given

F. C. JACOBS,

Judge.

Refused _____ . (8.) [49]

VIII.

The jury is instructed that Rodgers, the plaintiff in this case, cannot in any event recover for any damage which was not the natural and necessary result of the accident and injury then sustained, if you find from the evidence that he sustained injury at the time of the accident. And, if you find, from the evidence, that the plaintiff has now or has had any other disability resulting from conditions which existed in the plaintiff prior to said accident and of which the accident in question was not the proximate cause, then you are not permitted by law to allow anything for such disability and should not do so from motives of sympathy or from any other motive.

Given

F. C. JACOBS,
Judge.

Refused _____.

Respectfully submitted,
PAUL G. McIVER and G. P. BULLARD,
Attorneys for Defendant.

[Endorsed]: No. L-274-Phx. Instructions requested by Defendant. Filed May 24, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [50]

L-274 (PHOENIX).

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at \$5250.00 dollars.

H. O. RAMSEY,
Foreman.

[Endorsed]: No. L-274 Phx. Verdict. Filed May 25th, 1923. C. R. McFall, Clerk. By Paul Dickason, Chief Deputy Clerk. [51]

In the District Court of the United States in and
for the District of Arizona.

No. L-274—PHX.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

Defendant's Motion for New Trial.

Comes now the defendant, above named, by its attorneys, and respectfully moves the Honorable Court to set aside and vacate the verdict of the jury in this action, and to grant a new trial thereof.

Said motion is made upon the following grounds and for the following causes, to wit:

1. That the Court erred in admitting evidence over the objection of the defendant and excepted to by the defendant.
2. That errors of law occurred at the trial and during the progress of the cause.
3. That the Court erred in instructing the jury.
4. That the Court erred in refusing instructions requested by the defendant.
5. That the verdict is not justified by the evidence and is contrary to law.

PAUL G. McIVER and G. P. BULLARD,
Attorneys for Defendant.

[Endorsed]: No. L-274 — P h x. Defendant's Motion for New Trial. Rec'd Copy this 31st day of May, 1923. Fred C. Bolen, Attorney for Pltf.

Filed C. R. McFall, Clerk. May 31, 1923. United States District Court for the District of Arizona. By Chas. H. Adams, Deputy Clerk. [52]

In the District Court of the United States for the
District of Arizona.

No. L-274—PHX.

WALTER RODGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

**Order Extending Time to and Including July 15,
1923, to File Bill of Exceptions.**

IT IS HEREBY ORDERED that the defendant,
Twohy Brothers Company, shall be allowed to and
including the fifteenth day of July, 1923, within
which to present and file its bill of exceptions in the
above-entitled matter.

F. C. JACOBS,

Judge.

[Endorsed]: No. L-274—Phx. Order Fixing
Time for Filing Bill of Exceptions. Filed C. R.
McFall, Clerk. June 18, 1923. United States Dis-
trict Court for the District of Arizona. By Paul
Dickason, Chief Deputy Clerk. [53]

United States of America, District Court of the
United States, District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY,

Defendant.

Judgment.

This cause coming on to be heard before the Court and a jury on the 21st day of May 1923, said cause having been duly set for trial on said day, and the plaintiff being present in person and by his attorneys, Fred C. Bolen, Spencer B. Pugh and Win Wylie, and the defendant being present by its attorneys G. P. Bullard and Paul McIver;

And both parties having announced ready for trial, witnesses were sworn, after a jury was duly impaneled and sworn, and the testimony taken in behalf of the plaintiff and the defendant, and the hearing of said cause continued during the 22d, 23d and 24th of May, 1923, and on said both parties having rested and arguments of counsel having been heard, the Court having instructed the jury and the jury retired to consider their verdict;

Thereupon, on the 25th day of May, 1923, the jury returned into open court their verdict in the words and figures, to wit:

(Title and Venue of Cause.)

We, the jury impaneled and sworn in the above-entitled action upon our oaths do find for the plaintiff and assess his damages at \$5250 Dollars.

H. O. RAMSEY,

Foreman. [54]

And said verdict having been duly recorded, in consideration of the premises and the verdict of the jury,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff, Walter Rogers, do have and recover of and from the defendant, Twohy Bros. Company, a corporation, the sum of Five Thousand Two Hundred and Fifty (\$5,250) Dollars, together with costs of suit in the sum of \$68.95 Dollars; for which let execution issue.

Done in open court on this 25th day of May, 1923.

F. C. JACOBS,

Judge.

O. K. as to form—G. P. BULLARD,

Atty. for Deft.

[Endorsements]: No. L-274—Phx. Judgment. Received Copy on this 13 day of May, 1923, and Approved as to Form. G. P. Bullard, Attorneys for Defendant.

Filed C. R. McFall, Clerk. June 21, 1923. By Chas. H. Adams, Deputy Clerk. [55]

In the District Court of the United States, for the
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Petition for Writ of Error.

Comes now Twohy Brothers Company, a corporation, defendant in the above-entitled action, and represents to the Court that on the twenty-fifth day of May, 1923, a verdict in the sum of Five Thousand Two Hundred Fifty (\$5,250.00) Dollars in favor of the plaintiff and against the defendant was returned into court by a jury in the above-entitled cause, and on said date the Court gave judgment upon said verdict in said sum against this defendant and in favor of the plaintiff, and further represents that in the orders made and entered by the above-entitled court permitting the plaintiff to amend his complaint by setting up a new cause of action under the Employers' Liability Law of the State of Arizona after having brought his action under the common law, and in the rulings of the Court permitting evidence to be introduced under such amended pleadings, and in the rulings of the Court with respect to the giving of certain instructions based upon said Employers' Liability

Law over the objection of the defendant, and in the rulings of the Court refusing certain instructions requested by the defendant, and in the judgment entered in favor of the plaintiff upon said verdict, certain errors were committed to the prejudice of the defendant, all of which will in more [56] detail appear from the assignments of error filed herewith.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceeding and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals.

RICHARD E. SLOAN, C. R. HOLTON, and
E. G. SCOTT, and PAUL G. McIVER,
Attorneys for Defendant. [57]

In the District Court of the United States for the
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Assignments of Error.**ASSIGNMENT No. I.**

The Court erred in denying defendant's motion to strike from the files the second cause of action set forth in plaintiff's first amended complaint for the following reasons:

That the plaintiff, a workman, brought suit in the Superior Court of Maricopa County, Arizona, against the defendant, his employer, asking in his original complaint for damages for personal injuries alleged to have been sustained while in the service of such employer and based such action upon the alleged negligence of the defendant under the common law. An employee who is injured in the course of his employment in what is designated by such law as a hazardous occupation has open to him three separate and distinct avenues of redress, any one of which he may pursue. They are: The common law liability for negligence; the Employers' Liability Law, and the Compulsory Compensation Law.

The law of the State of Arizona, however, provides that any suit brought by the workman for a recovery shall be held to be an election to pursue such remedy exclusively. The plaintiff having chosen to bring his action [58] originally under the common law has, under the Arizona statute, elected to pursue that remedy exclusively and is precluded from a recovery under any of the other remedies theretofore open to him. The second cause of action set forth in plaintiff's first amended

complaint attempts expressly to state facts bringing it within the Employers' Liability Law of the State of Arizona.

Inasmuch as plaintiff was precluded from a recovery under such law the said second cause of action constitutes surplusage and should have been stricken and the Court erred in refusing to strike the same.

ASSIGNMENT No. II.

The Court erred in denying defendant's motion to strike all of plaintiff's second amended complaint from the files for the following reason:

In plaintiff's second amended complaint he abandons entirely his cause of action under the common law and seeks recovery entirely under the Employers' Liability Law of the State of Arizona. As shown in Assignment No. I, it is our theory that the plaintiff was precluded from bringing his action under the Employers' Liability Law and for that reason his second amended complaint was surplusage and should have been stricken out.

ASSIGNMENT No. III.

The Court erred in denying defendant's motion to strike from the files plaintiff's third amended complaint for the following reason:

Such third amended complaint seeks recovery under the Employers' Liability Law. The only difference between the second amended complaint and the third amended complaint is a change in the amount sought and some difference in the injuries alleged to have been sustained. As stated in former [59] assignments, our contention is that

the plaintiff is precluded from bringing his action under the Employers' Liability Law and therefore his third amended complaint constitutes mere surplusage and should have been stricken.

ASSIGNMENT No. IV.

The Court erred in overruling defendant's objection to the introduction by the plaintiff of any testimony under said third amended complaint for the reason that said objections were specifically based upon the ground that the plaintiff having instituted suit against the defendant under the common law had made his election to pursue such remedy exclusively and was precluded from recovery under said third amended complaint which, as above shown, was based upon the Employers' Liability Law of the State of Arizona.

ASSIGNMENT No. V.

The Court erred in refusing to give the following instruction requested by the defendant:

The plaintiff having failed to prove his case,
you are instructed to return a verdict for the
defendant

for the following reason:

The plaintiff announced at the opening of the case that he was proceeding to trial upon the third amended complaint, and in truth and in fact did proceed during the trial upon said third amended complaint, which said amended complaint was, as above shown, based upon the Employers' Liability Law of the State of Arizona and not upon the common law liability.

That the plaintiff having offered no evidence in support of his action originally instituted under the

common law should not be permitted to recover under 'proof of facts set forth in his complaint based upon the Employers' Liability Law, for the reason that under our theory of the case plaintiff was precluded from pursuing any remedy other than [60] that originally adopted and therefore the Court erred in refusing the instruction for a directed verdict.

ASSIGNMENT No. VI.

The Court erred in instructing the jury in the following language:

The action is based upon what is known as the Arizona Employers' Liability Act.

Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show; first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and about such premises is service in a haz-

ardous occupation within the meaning of said Employers' Liability Act. The Employers' Liability Act covers other occupations, but you are concerned solely with the question as to whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and in further instructing the jury as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master (defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and in further instructing the jury as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, [61] 1921, the plaintiff, Walter Rogers, was in the employ of and was employed by the defendant, Twohy Brothers, at and in their

mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury, as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the Court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

for the reason that all of the foregoing instructions are based upon the Employers' Liability Law. The plaintiff having brought his action originally under the common law and by so doing having elected to pursue such remedy exclusively is not entitled to a recovery under the Employers' Liability Law. The foregoing instructions being based entirely upon the Employers' Liability Law and directing a recovery upon proof of such facts were erroneous.

[Endorsed]: No. L-274—Phx. Petition for Writ of Error and Assignments of Error. Filed.

July 13, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Service of Copy of within instruments hereby acknowledged this 13th day of July, 1923.

SPENCER B. PUGH and

FRED C. BOLEN,

Attorneys for Plaintiff. [62]

In the District Court of the United States, in and
for the District of Arizona.

No. L-274 (PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Writ of Error.

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between Walter Rogers, plaintiff, and the Twohy Brothers Company, a corporation, defendant, manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been, shall be duly corrected and full and

speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit Court within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of July, 1923, and of the Independence of the United States the one hundredth and forty-eighth.

[Seal]

C. R. McFALL,
Clerk.

By Paul Dickason,
Chief Deputy Clerk.

[Endorsed]: Filed July 24, 1923. C. R. McFall, Clerk.

Return on Writ of Error.

The answer of the Judge of the District Court of the United States for the District of Arizona, to the within writ of error.

As within commanded, I certify under the seal of my said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

By the Court:

[Seal]

C. R. McFALL,
Clerk U. S. District Court for the District of
Arizona.

By M. R. Malcolm,
Deputy. [63]

In the District Court of the United States for the
District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Bill of Exceptions.

BE IT REMEMBERED that on or about the twenty-first day of May, 1921, the record on removal from the Superior Court of the State of Arizona in and for the County of Maricopa to the United States District Court for the District of

Arizona in the above-entitled cause was filed with the Clerk of said United States District Court.

That among the records so filed as aforesaid was the complaint of the plaintiff originally filed in said Superior Court of Maricopa County, Arizona. That said complaint sought a recovery for damages alleged to have been suffered by the plaintiff by reason of certain personal injuries alleged to have been received while in the employ of the defendant and said complaint was based upon the alleged negligence of the defendant and sought a recovery against said defendant under what is known as the "common law" liability for negligence. That attached hereto and marked Exhibit "A," is a copy of said original complaint so removed from the Superior Court of Maricopa County, Arizona, as aforesaid.

That thereafter, to wit, on or about the twenty-first day of May, 1921, said plaintiff by his attorney filed with the Clerk of said United States District Court what was designated "First Amended Complaint" wherein the plaintiff [64] set forth two alleged causes of action against the defendant; the first, based upon the common law liability of the defendant for negligence, and the second, based upon what is known as the Employers' Liability Law of the State of Arizona. That attached hereto and marked Exhibit "B," is a copy of said first amended complaint filed by said plaintiff.

That thereafter, to wit, on or about the seventeenth day of June, 1921, the defendant, by its attorney, filed with the Clerk of said United States

District Court its motion to strike from the files the second cause of action of said first amended complaint upon the ground and for the reason that the plaintiff having filed his original complaint setting forth a cause of action under the common law had, under the laws of the State of Arizona, elected to pursue his remedy at common law to the exclusion of all other remedies.

That thereafter, and on or about the eighth day of October, 1921, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona before his Honor, Wm. H. Sawtelle, District Judge, said motion to strike was argued and submitted to the Court upon said argument, the affidavits, papers and files on file in said cause.

That thereafter and on the seventeenth day of October, 1921, and at said term of court, the Court made its order overruling defendant's motion to strike the second cause of action of plaintiff's first amended complaint, and further ordered that the plaintiff be granted leave to amend his complaint as of May 21, 1921, by adding the second cause of action under the Employers' Liability Law of the State of Arizona, said amendment being allowed upon the statement of counsel for plaintiff that he would proceed to trial upon said second cause of action, to which ruling [65] of his Honor, the said Judge, the defendant then and there prayed a bill of exceptions and his Honor, the said Judge, sealed the exception accordingly. That attached hereto and

marked Exhibit "C," is a copy of said Order so made as aforesaid.

BE IT FURTHER REMEMBERED that on or about the twelfth day of December, 1921, the plaintiff filed with the Clerk of said United States District Court his notice of motion for leave to amend, a copy of said notice being attached hereto marked Exhibit "D"; also his motion for leave to amend, a copy of said motion being attached hereto and marked Exhibit "E"; also his affidavit in support of said motion, a copy of said affidavit being attached hereto and marked Exhibit "F"; also a proposed second amended complaint, a copy of said complaint being attached hereto and marked Exhibit "G."

That on said twelfth day of December, 1921, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona, His Honor, Wm. H. Sawtelle, District Judge, by an order duly entered, granted said motion to amend, and on said date said amended complaint was filed in the office of the Clerk of said United States District Court, to which order and ruling of His Honor, the said Judge, the defendant then and there prayed a bill of exceptions, and His Honor, the said Judge, sealed the exception accordingly.

That thereafter and on or about the twentieth day of December, 1921, the defendant filed with the Clerk of said United States District Court its motion to strike the whole of plaintiff's second amended complaint from the files upon the ground

that theretofore and on or about the twenty-first day of April, 1921, in the Superior Court of [66] the State of Arizona, in and for the county of Maricopa, the plaintiff had filed his complaint in said action and had therein set up a course of action under the common law and that at said time the said plaintiff had failed to set up or to file any cause of action under the Employers' Liability Law of the State of Arizona. That by filing his original complaint under the common law the plaintiff elected to pursue his remedy at common law to the exclusion of all other remedies.

That thereafter and on the eleventh day of April, 1922, the said Judge of said Court by an order duly entered, denied said motion to strike from the files said second amended complaint, to which ruling the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

BE IT FURTHER REMEMBERED that on to wit, the twenty-first day of May, 1923, at a stated term of the above-entitled court begun and holding in the city of Phoenix in and for the District of Arizona, before His Honor, Fred C. Jacobs, District Judge, the issue joined in the above-stated cause between said parties came on to be tried before said Judge and a jury; the plaintiff being represented by Fred C. Bolen, Esq., his attorney, and Spencer B. Pugh, Esq., of counsel; and the defendant being represented by Paul G. McIver, Esq., its attorney, and George Purdy Bullard, Esq., of counsel, and

at the opening of the trial thereof the following proceedings were had:

Mr. Pugh, of counsel for plaintiff, announced that the plaintiff was proceeding under his third amended complaint on file in said action, whereupon Mr. Bullard of counsel for defendant objected on behalf of said defendant to the introduction of any evidence under said third amended complaint [67] upon the ground that the action as originally commenced in the Superior Court of Maricopa County, Arizona, was based upon the alleged negligence of the defendant and sought a recovery upon the theory of negligence and that subsequently the complaint was amended in such manner that it now, under plaintiff's third amended complaint, seeks a recovery under what is known as the Employers' Liability Law of the State of Arizona. That under the provisions of said Employers' Liability Law as construed by the Supreme Court of the State of Arizona, the bringing of an action constitutes an election of the remedy to be pursued and that as soon as such an election is made it becomes conclusive upon the plaintiff and may not be revoked by him and and that, therefore, the plaintiff should not be permitted to proceed under said third amended complaint nor to recover under the Employers' Liability Law of the State of Arizona.

Mr. Bullard further announced at said time that in order to preserve the record that he would object upon the offering of any testimony by the plaintiff. Whereupon WALTER ROGERS, the plaintiff, was called and sworn as a witness, and the following questions asked:

Testimony of Walter Rogers, in His Own Behalf.

Q. Your name is Walter Rogers? A. Yes, sir.

Q. You are the plaintiff in this case?

Mr. BULLARD.—One moment if the Court please, we desire to object to the introduction of any evidence under this amended complaint upon the ground that the action was first brought under the common law and the plaintiff failed to proceed under that remedy, and further, upon the ground that the amended complaint does not state a cause of action under the Employers' Liability Act.

The COURT.—Your objection is overruled.

Mr. BULLARD.—To which we may take an exception?

The COURT.—Yes, you may note an exception.

Mr. BULLARD.—And it may be considered that the same general objection goes to all the testimony that may be introduced and Your Honor will make the [68] same ruling and we may have the same exception?

The COURT.—It may be so considered without repeating the objection to the testimony.

BE IT FURTHER REMEMBERED that on or about the twenty-fifth day of May, 1923, at the close of the above-entitled cause and before the submission thereof to the jury and before the Court had instructed the jury, the defendant requested the Court that he instruct the jury as follows:

“The plaintiff having failed to prove his case, you are instructed to return a verdict for the defendant.”

but at said time and place the said Judge, the Honorable Fred C. Jacobs, did rule that said instruction was not applicable to the law or to the evidence and did reject said instruction and did refuse to give the same, whereupon, the said defendant did then and there pray a bill of exceptions to said ruling and His Honor, the said Judge, did grant an exception thereto.

BE IT FURTHER REMEMBERED that at the close of the case and before the same had been submitted to the jury, the Court instructed the jury as follows:

The action is based upon what is known as the Arizona Employers' Liability Act.

Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show, first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and

about such premises is service in a hazardous occupation within the meaning of said Employers' Liability Act. The Employers' Liability Act covers other occupations but you are concerned solely with the question as to whether or not the [69] plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master (defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of and was employed by the de-

fendant, Twohy Brothers, at and in their mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place, and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

to which instructions the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

BE IT FURTHER REMEMBERED that on the thirty-first day of May, 1923, the defendant filed its motion for a new trial in said cause whereby the said defendant did move the Honorable Court to set aside and vacate the verdict of the jury and to grant a new trial upon the following grounds and for the following causes, to wit: [70]

1. That the Court erred in admitting evidence over the objection of the defendant and excepted to by the defendant.

2. That errors of law occurred at the trial and during the progress of the cause.

3. That the Court erred in instructing the jury.

4. That the Court erred in refusing instructions requested by the defendant.

5. That the verdict is not justified by the evidence and is contrary to law.

and that on the second day of June, 1923, it was ordered by the Court that the said defendant's motion for a new trial be denied, to which order of His Honor, the said Judge, the defendant then and there prayed a bill of exceptions and His Honor, the said Judge, sealed the exception accordingly.

* * * * *

The foregoing bill of exceptions having been presented to me for allowance within the time fixed by order of the Court for such purpose and the same having been examined by me and found to be correct, the same is now on this 24th day of July, 1923, duly signed, approved and allowed.

F. C. JACOBS,
Judge. [71]

Exhibit "A."

(COPY)

In the Superior Court of the State of Arizona, in
and for the County of Maricopa.

No. 14149.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

COMPLAINT.

Now comes the plaintiff and for a cause of action
against the defendant, complains and alleges:

I.

That defendant is now, and was at the time and
times hereinafter mentioned, a corporation duly
incorporated under the laws of the State of Arizona,
and doing business as such corporation in the
County of Maricopa and State aforesaid.

II.

That the plaintiff is a resident of the County of
Maricopa, and was at the times hereinafter men-
tioned a resident of said county and state.

III.

That defendant company was, at the times here-
inafter mentioned, engaged in the construction and
building of public highways in the County of Mari-
copa, to wit; that certain portion of the public
highway known as the Indian-School Road and at

a point about three miles east of what is known as the "West End Store," and being situate at an [72] appropriate distance of about twelve miles, more or less, west of the city of Phoenix, county of Maricopa, state of Arizona.

IV.

That on and prior to the 25th day of March, 1921, plaintiff was an employee of said defendant company; that plaintiff's dailey duties of said employment with said defendant company, were to assist in connecting and making fast what is called and known in said business, a bale, to cars or buckets loaded with sand, gravel and cement, and to assist in guiding said bale and holding same in its proper place and position while said sand, gravel and cement, was being unloaded into what is known and called a skiff, and used for the conveyance of said sand, gravel and cement, to what is known and called the mixer.

V.

That on or about the 25th day of March, 1921, and while plaintiff was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without any fault, carelessness or negligence whatever upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; it did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway, as aforesaid; that plaintiff was compelled to, in the performance of his regular duties and employment, as

aforesaid, to push, haul and pull upon said bale, as to then and there, and at said time and place, receive great and severe bodily strain and internal injuries, to wit, a sprained back, a dislocation of the 5th lumbar vertebra and a severe rupture and hemorrhoids. [73]

VI.

That by reason of the said injuries so received as aforesaid, plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries, and as a consequence thereof, plaintiff has been and now is, sick, sore and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain and anguish, and that he has been and now is unable to engage in any occupation to earn a livelihood whatsoever, and will forever remain maimed and crippled, and thereby incurring great loss and damage to the plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and on account of said injuries, as aforesaid, plaintiff has been further damaged in the sum of \$200.00 expended for medical services and treatment, such services and treatment being necessary for the relief of the pain and bodily suffering caused by said injuries; that plaintiff has been damaged by reason of the extreme physical pain, suffering and mental anguish due to said injuries.

That by reason of said injuries so received, as aforesaid, plaintiff has been permanently injured and forever *hindred* from following his usual voca-

tion and from engaging in any means of livelihood, to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the defendant company in the sum of \$20,000.00 and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: No. 14149. Filed Apr. 23, 1921. Claude S. Berryman, Clerk. By Angie P. Byrne, Deputy.

[Endorsed]: No. L-274—Phx. Filed May 21, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [74]

Exhibit "B."

(COPY)

In the United States District Court, in and for the
District of Arizona.

No. —.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

FIRST AMENDED COMPLAINT.

Now comes the plaintiff herein and for a cause of action against the defendant, complains and alleges:

I.

That plaintiff is a resident of Maricopa County, State of Arizona.

II.

That defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the county of Maricopa, and state aforesaid.

III.

That said defendant company was, at the times hereinafter mentioned, engaged in the building and construction of public highways in the county of Maricopa, to wit; that portion of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the [75] County of Maricopa, and State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, plaintiff herein was an employee of said defendant company; that plaintiff's duties of employment with said company, were in part, to assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one car or bucket attached thereto, in its proper

place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being used to convey said sand, gravel and cement, to what is known and called in said business the "mixer." That plaintiff was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

V.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the due course of his regular duties of employment with defendant company, as aforesaid, and without fault, carelessness or negligence upon the part of plaintiff, but due solely to the neglect, fault, carelessness and negligence of the defendant company, in that; it then and there so carelessly and negligently located and placed the machinery hereinbefore designated as the "bale," in paragraph IV herein, as to require of this plaintiff in the regular performance of his duties, to push, to haul, and pull upon said bale then and there connected and attached to said car or bucket loaded with sand, gravel and cement, as aforesaid, and to use unnecessary [76] and severe bodily strength and physical strain, to make and complete the required and necessary connection between said bale and said skiff that was so required for the unloading of said sand, gravel and cement into said skiff to be conveyed to the said mixer, as hereinbefore mentioned. That the improper location and adjustment of the

said bale and machinery at said time and place as aforesaid, was the direct and proximate cause of plaintiff then and there receiving great and severe bodily strain and severe internal injuries, to wit, a sprained back, a dislocation of the vertebra, a severe rupture and hemorrhoids.

VI.

That by reason of said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries, to wit, the 25th day of March, 1921, plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is, sick, sore, and in ill health; that he is unable to walk about without assistance and experiencing extreme bodily pain, and that he has been and now is unable to engage in any occupation to earn a livelihood, and will forever be maimed and crippled thereby incurring great loss and damage to this plaintiff in the sum of Ten Thousand Dollars (\$10,000.00).

That by reason and on account of said injuries, as aforesaid, this plaintiff has been further damaged in the sum of Five Hundred Dollars (\$500.00) expended for medical services, nursing and treatment, said medical services, nursing and treatment being required and necessary for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, this plaintiff has been permanently injured [77] and forever *hindred* from following

his usual vocation to his damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

Comes now the above-named plaintiff, Walter Rogers, by his attorney, and for a second and further cause of action against the defendant, Twohy Bros. Company, a corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the laws of the State of Arizona, and doing business as such corporation in the County of Maricopa, and State aforesaid.

III.

That on and prior to the 25th day of March, 1921, said defendant Company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used

and operated in the building and construction of public highways in the county of Maricopa, to wit; That portion [78] of the public highway known as the Indian Road and at a point about three miles east of, what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said Bale, with one of said cars or buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement to and into, what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the

time of the accident and injury hereinafter described.

V.

That the said occupation in which said plaintiff, Walter Rogers, was employed at said time and place, as aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under [79] which this action is instituted, and that said occupation was hazardous in fact.

VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel

and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while the plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit: pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, [80] gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit, a sprained back, slight dislocation of the vertebra, a severe rupture, and hemorrhoids.

VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk without assistance and experiencing extreme bodily pain; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000).

That by reason and on account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services, nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00).

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00), and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: Filed May 21, 1921. C. R. McFall,
Clerk. By Clyde C. Downing, Chief Deputy Clerk.
[81]

Exhibit "C."

(COPY.)

In the District Court of the United States in and
for the District of Arizona.

No. L-274—PHOENIX.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corpora-
tion,

Defendant.

Plaintiff filed his complaint against the defendant in the state court, setting up a cause of action under the common law. Thereafter the defendant removed said cause to this Court. After it was so removed plaintiff, without leave of the Court, filed an amended complaint by adding thereto a count under the Employers' Liability Law of this state. Defendant has moved this Court to strike all of the second cause of action of the plaintiff's first amended complaint from the files on the following grounds: (1) That the complaint, as originally filed in the state court set up a cause of action under the common law; (2) That the plaintiff in so filing his said complaint in the said state court, made his election to pursue his remedy under the common law to the exclusion of all other laws.

The question is whether the mere filing of said original complaint in the state court constituted an

election on the part of said plaintiff. Defendant relies upon Section 3176 of the Revised Statutes of Arizona, 1913, which is as follows:

“Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon [82] the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.” Paragraph 3.

And also upon the cases of Consolidated Arizona Smelting Company vs. Ujack, 15 Arizona Reports 382, and Calument and Arizona Mining Company vs. Chambers, 20 Arizona 54. In neither of these cases did the question of the right of plaintiff to amend arise and I cannot believe that either the Legislature or the Supreme Court of Arizona intended to hold that the mere filing of a complaint in which only one cause of action was set forth was an election which would thereafter prevent the plaintiff from amending his complaint, by leave of the Court, and setting forth another cause of action under the Arizona law.

It is true that if the plaintiff elects to pursue a remedy under either one of the statutes he thereby is excluded from pursuing a remedy under any other statute but I think that the decisions and the

statutes referring to election of remedies mean an election made after the case is at issue and not before the Court's rights to allow amendments to the complaint is passed. I believe the plaintiff would have been permitted under the law to amend his complaint in the state court. If so, why should he not be permitted to amend in this court. The Arizona statutes regulating amendments of pleadings are very liberal and Courts should not be too technical in allowing amendments of pleadings, especially where the opposite party has suffered no inconvenience or been placed at no disadvantage.

It is, therefore, ORDERED that the plaintiff be and is hereby granted leave to amend his complaint, as of [83] May 21st, 1921, by adding the second cause of action under the Employers' Liability Law of Arizona and that the defendant's motion to strike said second cause of action from the files be and the same is hereby overruled.

IT IS FURTHER ORDERED that defendant's demurrer to said second cause of action be and the same is hereby overruled. Plaintiff's counsel stated in argument that if the Court allowed the amendment to the complaint by adding thereto the said second cause of action plaintiff would elect to proceed to trial on said second cause of action.

Dated at Tucson, Arizona, this 17th day of October, A. D. 1921.

WM. H. SAWTELLE,

Judge.

[Endorsed]: Filed Oct. 17, 1921. C. R. McFall,
Clerk. [84]

Exhibit "D."

(COPY.)

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

NOTICE OF MOTION FOR LEAVE TO
AMEND.

To Twohy Bros. Company, Messrs. Bullard &
Jacobs, and McIver, Esqs. their Attorneys.

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned, will move the Court, at the courtroom thereof, at Phoenix, Arizona, on the 14th day of December, 1921, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his first amended complaint herein, by the insertion of the following words, to wit:

*Severe injuries to the Vertebral Column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—*After the word to wit: on line four, of page four, and the insertion of the following words, *about without ex-*

periencing severe bodily fatigue; After the word walk, on line seventeen, of page four thereof, and for such other and further relief as may be just.

FRED C. BOLEN,
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [85]

Exhibit "E."

(COPY.)

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

MOTION FOR LEAVE TO AMEND.

Comes now the plaintiff, in the above-entitled cause, by his attorney Fred C. Bolen, and moves this Court for an Order for leave to amend his first amended complaint on file herein by the insertion of the following words, to wit:

Severe injuries to the Vertebral Column, more particularly to the lumber, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also—After the word to wit; on line four, of page four, and leave

to insert the following words, to wit; *about without experiencing severe bodily fatigue*; After the word walk, on line seventeen, of page four thereof.

FRED C. BOLEN,
Attorney for Plaintiff.

Dated this 14th day of December, 1921. [86]

Exhibit "F."

(COPY.)

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

AFFIDAVIT.

Fred C. Bolen, being first duly sworn, deposes and says: that he is the attorney for the plaintiff, Walter Rogers, in the above-entitled action; that he is more familiar with the matters herein stated than said plaintiff and makes this affidavit for and in his behalf; that said action was commenced in the Superior Court of Maricopa County, State of Arizona, on the 21st day of April, 1921, and was transferred to this court by the said defendant Company, on the 21st day of May, 1921, and is brought for the

purpose of recovery of damages for personal injuries alleged to have been received and sustained by the plaintiff, Walter Rogers, while in the service and employ of the said defendant Company. That issue has been joined and the cause is now upon the Calendar of this Court awaiting trial.

That it becomes necessary for the plaintiff to file an amended complaint in this action, for the following reasons, to wit:

That on or about the 3d day of November, 1921, and upon the application filed in this Court by said defendant Company, and under and by virtue of Chapter 131 of the [87] Session Laws of Arizona, 1921, authorizing and empowering Courts in personal injury cases to order and direct a physical examination of the person injured, this Court entered an order appointing and directing Dr. Coit Hughes, of Phoenix, Arizona, to make a physical examination of the plaintiff, Walter Rogers, on behalf of the defendant, Twohy Bros. Company. That on the 25th day of November, 1921, said examination was had and X-Ray Photos made—plaintiff's alleged injuries. That the said X-Ray photo so taken of the plaintiff's "Vertebra Column," have enabled affiant to more specifically set forth in the proposed second amended complaint the injuries alleged to have been so received by said plaintiff.

That the plaintiff and this affiant *was* ignorant of the facts as herein stated when his former complaint herein was filed in this Court.

FRED C. BOLEN.

Subscribed and sworn to before me this 14th day
of December, 1921.

[Notarial Seal]

SPENCER B. PUGH.

Notary Public.

My commission expires 10-30-1922. [88]

Exhibit "G."

(COPY.)

In the United States District Court in and for the
District of Arizona.

No. L-274.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROS. COMPANY, a Corporation,
Defendant.

SECOND AMENDED COMPLAINT.

Comes now the above-entitled plaintiff, Walter Rogers, by his attorney, Fred C. Bolen, and for a cause of action against the defendant, Twohy Bros. Company, a Corporation, complains and alleges:

I.

That plaintiff herein is a resident of Maricopa County, and State of Arizona.

II.

That the defendant is now, and was at the time and times hereinafter mentioned, a corporation duly organized and doing business under and by virtue of the Laws of the State of Arizona, and

doing business as such corporation in the county of Maricopa, and State aforesaid.

III.

That on and prior to the 25th day of March, 1921, said defendant Company was, and now is, the owner of a certain cement mixing plant where gasoline and mechanical power was and now is being used to operate the machinery and appliances in and about said plant, which said plant was then and there, to wit; on the 25th day of March, 1921, being used [89] and operated in the building and construction of Public Highways in the county of Maricopa, to wit; That portion of the public highway known as the Indian Road and at a point about three miles East of what is known as and called the "West End Store," said store being situated at an approximate distance of twelve miles, more or less, in a westerly direction from the city of Phoenix, in the county of Maricopa, and State of Arizona.

IV.

That on and prior to the 25th day of March, 1921, the plaintiff, Walter Rogers, was in the employ of said defendant company and in their service engaged in manual and mechanical labor in and about said plant, machinery and appliances, as aforesaid. That plaintiff's duties of said employment with said defendant company, were in part, to connect and assist in connecting and making fast what is known and called in said business the "bale," to cars or buckets, said cars or buckets being loaded with sand, gravel and cement, and to assist in guiding and holding said bale, with one of said cars or

buckets attached thereto, in its proper place and position while said car or bucket was then and there being lifted, by mechanical power, and unloaded of said sand, gravel and cement, into what is known and called in said business the "skiff," said skiff being then and there used to convey said sand, gravel and cement, to and into what is known as and called in said business the "mixer." That plaintiff herein was so engaged in such duties of employment at the time of the accident and injury hereinafter described.

V.

That the said occupation in which said plaintiff Walter Rogers, was employed at said time and place, as [90] aforesaid, was hazardous as declared and determined by subdivision (10), of Section 3156, Chapter VI, Civil Code of Arizona, under which this action is instituted, and that said occupation was hazardous in fact.

VI.

That on or about the 25th day of March, 1921, and while plaintiff herein was engaged in the employ and service of said defendant Company, and while he was then and there engaged in and about the performance of his regular duties in and about said plant, machinery and appliances, as aforesaid, this plaintiff sustained and received severe and permanent injuries by reason of an accident, said accident arising out of and in the course of such duties of labor, service and employment.

That due to the condition and conditions of such employment, as aforesaid, plaintiff was required to

push, haul, and to pull upon said bale, while said bale was then and there connected and attached to said cars or buckets then and there loaded with sand, gravel and cement as hereinbefore described in Paragraph IV herein, and to use severe bodily strength and physical strain, to make and complete the required and necessary connection between the said bale and the said skiff, that was so required in the operation of unloading of said sand, gravel and cement from said bale into the said skiff, at the time and place as aforesaid.

That while so employed with his duties in and about the plant, machinery and appliances, as aforesaid, and while in the exercise of due care for his own safety and without carelessness or negligence on his part, and while this plaintiff at said time and place was so laboring under the severe bodily and physical strain, to wit; pushing, pulling and hauling upon said bale, which said bale was [91] then and there connected with said car or bucket loaded with sand, gravel and cement, as aforesaid, he then and there met with the accident wherein plaintiff sustained and suffered severe internal injuries, to wit; Severe injuries to the vertebral column, more particularly to the lumbar, sacrum and coccyx vertebra, serious injuries to the blood vessels, nerves, muscles and ligaments adjacent thereto, also rupture and hemorrhoids.

VII.

That by reason of the said injuries so received, as aforesaid, this plaintiff has suffered and now does suffer extreme bodily pain; that prior to the date

of said injuries plaintiff enjoyed the best of bodily health; that since the date of said injuries and as a consequence thereof, plaintiff has been and now is sick, sore, and in ill health; that he is unable to walk about without experiencing severe bodily fatigue; that ever since the date of said accident and injuries he has been and now is unable to engage in any occupation to earn a livelihood, and will forever remain maimed and crippled, thereby incurring great loss and damage to plaintiff in the sum of Ten Thousand Dollars (\$10,000.00). That by reason and account of said accident and injuries, as aforesaid, plaintiff has been damaged in the sum of Five Hundred Dollars (\$500.00) for medical services, nursing and treatment, such medical services nursing and treatment being required and necessary expenditures for the relief of the pain and suffering caused by said injuries, as aforesaid. That by reason of said injuries so sustained and received, plaintiff has been permanently injured and forever hindered from following his usual vocation, to his further damage in the sum of Ten Thousand Dollars (\$10,000.00). [92]

WHEREFORE, plaintiff prays judgment against the said defendant, Twohy Bros. Company, in the sum of Twenty Thousand and Five Hundred (\$20,500.00) Dollars, and for his costs herein incurred.

FRED C. BOLEN,
Attorney for Plaintiff.

[Endorsed]: Filed Dec. 12, 1921. C. R. McFall,
Clerk. By Clyde C. Downing, Chief Deputy Clerk.

[Endorsed]: No. L-274—Phx. Bill of Exceptions. Service of Copy of Within Instrument Hereby Acknowledged this 13th day of July, 1923. Spencer B. Pugh, Fred C. Bolen, Attorneys for Plaintiff. Filed July 13, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [93]

In the District Court of the United States for the
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

**Order Granting Writ of Error and Fixing Super-
sedeas and Appeal Bond.**

Upon the application of the defendant, by its attorneys, Richard E. Sloan, C. R. Holton and E. G. Scott, for the allowance of a writ of error on the assignments of error intended to be urged by them, praying also that a transcript of the record, proceedings and papers, as well as the judgment entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises;

IT IS HEREBY ORDERED that a writ of error to said United States Circuit Court of Ap-

peals for the Ninth Circuit be and the same is hereby allowed and that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals.

IT IS FURTHER ORDERED that the bond on appeal be fixed at the sum of Seven Thousand Five Hundred Dollars (\$7,500.00), the same to act as a supersedeas bond and also as a bond for costs and damages on appeal.

Dated this 24th day of July, 1923.

F. C. JACOBS,
Judge.

[Endorsed]: No. L-274—Phx. Order granting Writ of Error and Fixing Supersedeas and Appeal Bond. Filed July 24, 1923. C. R. McFall, Clerk. [94]

In the District Court of the United States for the
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Supersedeas and Appeal Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, TWOHY BROTHERS COMPANY, a corporation, as principal, and HARTFORD ACCI-

DENT AND INDEMNITY COMPANY, a corporation, as surety, are held and firmly bound unto Walter Rogers, plaintiff in the above-entitled action in the sum of SEVEN THOUSAND FIVE HUNDRED (\$7,500.00) DOLLARS, lawful money of the United States to be paid to him, his heirs, executors, administrators and assigns, for which payment well and truly to be made we bind ourselves, and each of us our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this fourteenth day of July, 1923.

WHEREAS, the above-named Walter Rogers has obtained a judgment against the above-named defendant, Twohy Brothers Company, in the above-entitled court in the sum of Five Thousand Three Hundred Eighteen and 95/100 Dollars (\$5,318.95); and

WHEREAS, the above-named Twohy Brothers Company has prosecuted a writ of error to the Circuit Court of Appeals for the Ninth Circuit to reverse the judgment of said United States District Court for the District of Arizona in the above-entitled cause; and [95]

WHEREAS, the Court has fixed the bond on appeal at the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) and ordered that the same shall operate as a supersedeas.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Twohy Brothers Company shall prosecute its said writ of error and if it shall fail to make its plea good shall

answer all damages and costs, then this obligation shall be void; otherwise to remain in full force and effect.

TWOHY BROTHERS COMPANY,
By Richard E. Sloan, C. R. Holton, and E. G.
Scott, and George Purdy Bullard and Paul
G. McIver,

Its Attorneys.

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

[Corporate Seal] By Samuel White,
Its Attorney in Fact.
By H. F. Bringhurst,
Its Attorney in Fact.

[Endorsed]: No. L-274—Phx. Supersedeas
and Appeal Bond. Filed July 16, 1923. C. R.
McFall, Clerk. By Chas. H. Adams, Deputy Clerk.

Service of copy of within bond hereby acknowl-
edged this 16th day of July, 1923.

SPENCER B. PUGH,
FRED C. BOLEN,
Attorneys for Plaintiff. [96]

In the District Court of the United States, in and
for the District of Arizona.

L-274—(PHOENIX).

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Citation on Writ of Error.

The President of the United States to Walter Rogers, and Fred C. Bolen and S. B. Pugh, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the Twohy Brothers Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. C. Jacobs, Judge of the United States District Court for the District of Arizona, this 24th day of July, 1923, and of the Independence of the United States the one hundred and forty-eighth.

F. C. JACOBS,
United States District Judge for the District of Arizona.

UNITED STATES MARSHAL'S RETURN.

I received this writ at Phoenix, Arizona, July 25, 1923, and executed the same by delivering a true copy hereof to Fred C. Bolen, Attorney of Record

for the above-named Plaintiff, Walter Rogers, who was designated as the person upon whom service should be made by R. E. Sloan, one of the Attorneys for the Defendant, Twohy Bros. Company.

T. J. SPARKES,

U. S. Marshal.

By T. E. Benton,

Deputy.

[Endorsed]: Filed July 26, 1923. C. R. McFall, Clerk. By Chas. H. Adams, Deputy Clerk. [97]

In the District Court of the United States for the
District of Arizona.

No. L-274—Phx.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS COMPANY, a Corporation,
Defendant.

Praeipie for Transcript of Record.

To C. R. McFall, Clerk of the above-entitled Court:

Kindly prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause containing the following portions of the record in said cause:

Transcript on removal from the Superior Court of Maricopa County, Arizona, to the United States District Court for the District of Arizona;

Plaintiff's first amended complaint;

Defendant's demurrer and answer to first amended complaint. Defendant's motion to strike, demurrer and answer to second cause of action;

Order dated October 17, 1921, allowing amendment to complaint by adding second cause of action;

Notice of motion to amend. Motion to amend. Affidavit of Fred C. Bolen and second amended complaint;

Defendant's motion to strike, demurrer and answer to second amended complaint;

Affidavit for leave to amend;

Notice of motion for leave to amend and plaintiff's third amended complaint;

Defendant's objections for leave to amend;

Affidavit of Paul G. McIver in support of objection to leave to amend; [98]

Instructions requested by the defendant;

Verdict of the jury;

Defendant's motion for a new trial;

Order fixing time for filing bill of exceptions;

Judgment;

Petition for writ of error;

Writ of error;

Bill of exceptions;

Assignments of error;

Order granting writ of error and fixing supersedeas and appeal bond;

Supersedeas and appeal bond;

Citation;

Praeipie for transcript of record.

Dated this 26th day of July, 1923.

RICHARD E. SLOAN,

C. R. HOLTON,

E. G. SCOTT,

G. P. BULLARD and

PAUL G. McIVER,

Attorneys for Defendant.

[Endorsed]: No. L-274—Phx. Praeipie for Transcript of Record. Filed July 26, 1923. C. R. McFall, Clerk. By M. R. Malcolm, Deputy Clerk.

Service of copy of within hereby acknowledged this 26th day of July, 1923.

SPENCER B. PUGH,

Attorney for Plaintiff. [99]

In the District Court of the United States for the
District of Arizona.

WALTER ROGERS,

Plaintiff,

vs.

TWOHY BROTHERS, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,

District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona do

hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Walter Rogers, plaintiff, versus Twohy Brothers Company, a corporation, defendant, said case being number Law 274-Phoenix on the docket of said court.

I further certify that the foregoing 100 pages numbered from 1 to 100, inclusive, constitute a full, true and correct copy of the record, and of the assignment of errors and all proceedings in the above-entitled cause, as set forth in the praecipe filed in said cause and made a part of this transcript as the same appears from the originals of record and on file in my office as such Clerk.

And I further certify that there is also annexed to said transcript the original writ of error, and the original citation on writ of error issued in said cause.

I further certify that the cost of preparing and certifying to said record, amounting to forty-five and 85/100 Dollars (\$45.85), has been paid to me by the above-named defendant (plaintiff in error).

WITNESS my hand and the seal of said Court, this 21st day of August, 1923.

[Seal]

C. R. McFALL,
Clerk of the District Court of the United States, for
the District of Arizona.

By M. R. Malcolm,
Deputy Clerk.

[Endorsed]: No. 4081. United States Circuit Court of Appeals for the Ninth Circuit. Twohy Brothers Company, a Corporation, Plaintiff in Error, vs. Walter Rogers, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed August 23, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4080. 8

**In the United States Circuit Court of
Appeals for the Ninth Circuit.**

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR,

v.

NORTHERN PACIFIC RAILWAY COMPANY, DEFENDANT
IN ERROR.

PETITION FOR REHEARING.

THOS. P. REVELLE,

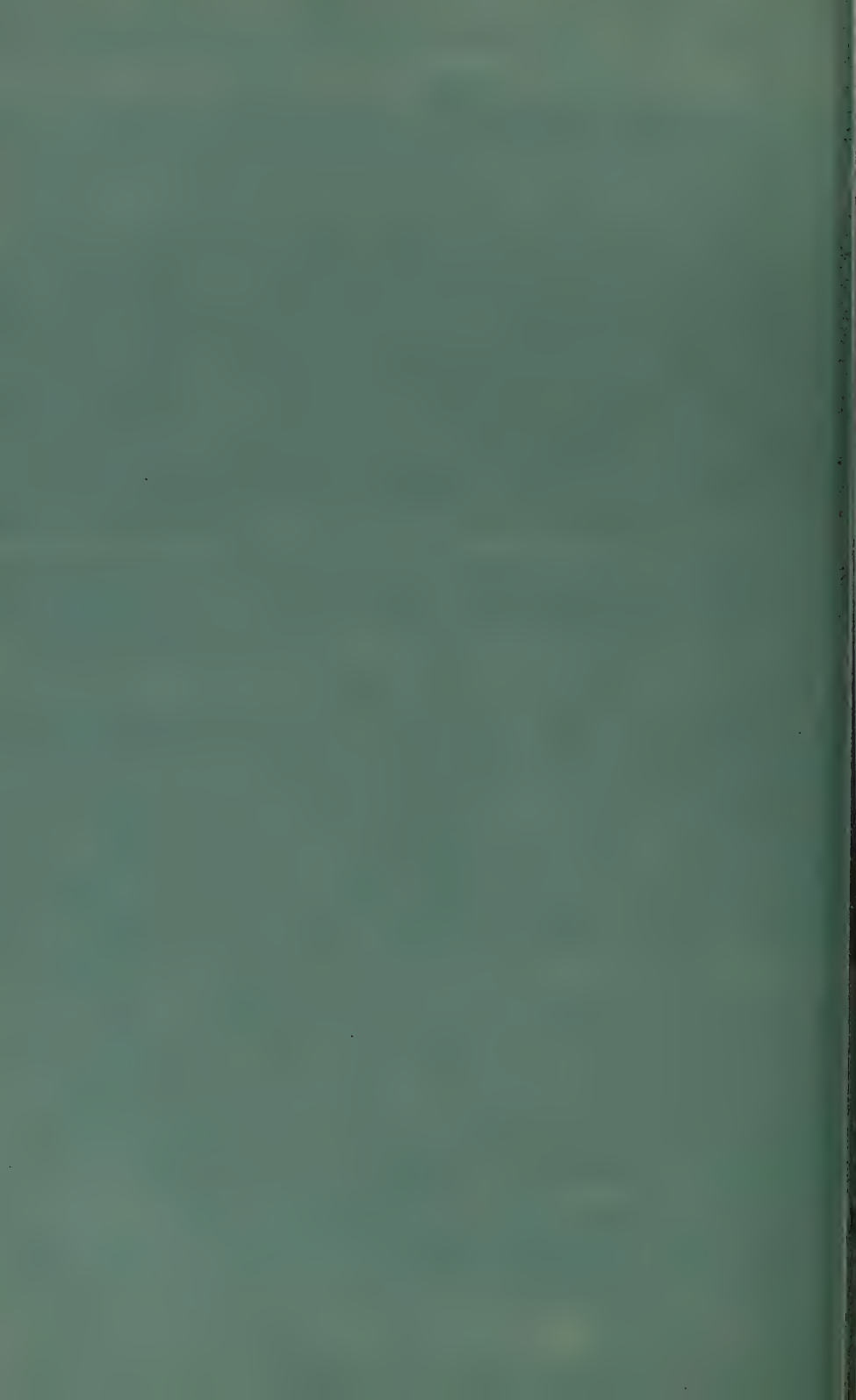
United States Attorney,

C. E. HUGHES,

Assistant United States Attorney,

M. C. LIST.

*Special Assistant to the United States Attorney,
Attorneys for Plaintiff in Error.*



In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,	} No. 4080.
v.	
NORTHERN PACIFIC RAILWAY COMPANY, defendant in error.	

PETITION FOR REHEARING.

Comes now The United States of America, by its attorneys, and respectfully petitions the Court for a rehearing on the 16 causes of action, as to which the judgment of the District Court was affirmed, for the following reasons:

I.

The decision of this Court is based upon the theory that while many errors were committed by the trial Court, to wit:

(a) In overruling plaintiff's demurrer to defendant's so-called affirmative defense;

(b) In refusing to grant plaintiff's motion to strike this so-called affirmative defense from the answer; and

(c) In admitting in evidence, over plaintiff's objection, a large amount of irrelevant testi-

mony, covering nearly 200 pages of the printed Record (the entire testimony totaling 256 pages),

none of them were prejudicial to the Government, for the reason "that the verdict of the jury was necessarily based" on some little indefinite, negative testimony introduced by defendant, and that the jury could not have been influenced, or misled, by defendant's successful efforts to inject into the case such a great mass of irrelevant testimony.

II.

But in its opinion the Court has overlooked the fact—

(a) That so much irrelevant testimony was introduced, that, even if it stood alone, its effect upon the jury could not have been entirely removed;

(b) That such irrelevant, sympathetic testimony actually misled the lower Court;

(c) That the lower Court, being misled by such testimony, further aggravated the situation by its statements or rulings during the progress of the trial and in charging the jury;

(d) That such irrelevant testimony had the earmarks of a prearranged plan to becloud the issues and mislead the Court and jury;

(e) That such testimony had the effect of opening the door to irrelevant, sympathetic, and prejudicial arguments;

(f) That the Government was not a party to the many manifest errors, both of omission

and commission, and should not suffer as a result thereof;

(g) That the defendant should not be allowed to profit by its own actions or conduct, even if we assume that it was ignorant of the law, especially as laid down by this Court in that other Northern Pacific case, 287 Fed., 780, or that it did not intend to becloud the issues; and

(h) That, considering the above and many other angles of the case, the Record does not justify the finding of an unknown quantity, to wit, that the jury was not misled or influenced by the large amount of woefully misleading testimony, especially in view of the fact that the trial Court itself was misled.

NECESSITY FOR SUIT.

In view of the fact that defendant successfully injected into this case a lot of so-called strike evidence, in order to raise or create a sympathetic issue for prejudicial purposes, there is no impropriety in saying, that so far as this case is concerned, defendant deserves no sympathy.

It was not the policy of the Government to ask a carrier to do the impossible during the so-called out-law strike; the Government only required a carrier to do all that it possibly could in the interest of safety; but this defendant, while repairing what cars it could, only aggravated a bad condition, and undoubtedly largely increased the number of defective cars, by its method of operation.

There was no necessity for commingling damaged cars with good-order cars in commercial service; the former are always a menace to the latter, and in many instances may be so defective as to become extremely perilous to employees and passengers and other trains.

Then, to further increase the dangers, defendant put defective logging cars into good-order commercial trains, also logging cars loaded with logs liable to shift, as defendant itself admitted, before they were moved ten feet.

Cars loaded with shifting logs are always a menace, and Congress saw the necessity of providing a means whereby carriers could operate such dangerous instrumentalities without endangering the lives of employees and possibly passengers on other trains; and with that in mind Congress excluded from the provisions of the Safety Appliance Act certain cars hauled in trains engaged exclusively in logging service. (Section 6, as amended.)

ARGUMENT.

In the absence of any irrelevant, sympathetic so-called strike testimony, thus eliminating any argument or instructions based thereon, no fair-minded jury would have decided that the 16 cars in question were not defective as alleged.

Were the Government not absolutely sure of its ground in this respect, we would be somewhat reluctant to make such a broad assertion; but, candidly, in order to enable this Court to arrive at a just

appreciation of the fact that defendant's evidence with respect to the actual condition of the 16 cars was practically nil, we feel the necessity, in fairness to this Court, of calling its attention to certain phases of the case which it has inadvertently overlooked.

GOVERNMENT'S POSITIVE TESTIMONY.

In order that the Court may realize the strength of the Government's evidence as to the condition of the 16 cars, we direct attention to a résumé of the testimony with respect to the first cause of action which is typical of the remaining causes of action.

Inspector Winter, of the Interstate Commerce Commission, testified (Rec. 38-40, 69)—

That on August 31, 1922, he made an inspection in the Northern Pacific yards at Auburn, Washington, on which day he inspected, among others, N. P. flat car 67219, loaded with logs;

That he first inspected this car on track No. 6, in the train yard, opposite the yard office, at about 9.15 in the morning, and that the handhold on the right-hand side of the "B" end of the car was bent in against the end sill, so that it had no clearance;

That he saw this car hauled from Auburn at 10.20 that morning in train Extra South, engine 1263, at which time it was still defective;

That at the time this train left Auburn the defective car was coupled in between N. P. flat car 67476 and car No. 62296; and

That he made a detailed record of what he saw at the time of the transactions or inspections.

Inspector Weeks, also of the Interstate Commerce Commission, testified (Rec. 121, 122)—

That he was with Mr. Winter when the several inspections were made;

That he made a personal record of what he personally saw; concurrently made with each transaction;

That when he first saw N. P. flat car 67219 that morning, "it had a handhold bent on the 'B' end, bent in against the sill opposite the lever, with no clearance";

That he saw this car leave in train Extra South, engine 1263, in the same defective condition.

With the exception of the defective condition of the car in question, most of the above evidence found corroboration in defendant's own records, its wheel report. (Ex. A 3.)

DEFENDANT'S NEGATIVE TESTIMONY.

The evidence of any actual inspection of the cars hauled from Auburn was practically nil. But giving the defendant the benefit of every doubt, let us very briefly review this evidence.

On August 31, 1922, defendant had at Auburn, according to one witness (Rec. 250), three men who inspected cars in the daytime; according to a second witness (Rec. 257), four to six men; and, according to defendant's mechanical superintendent (Rec. 205), fifteen to twenty inspectors.

But the record shows that for some unexplainable reason defendant only cared to use three of them as witnesses—Allmain, Burnham, and Crawford; and here is their testimony in a nutshell:

When two of these men inspected a train, which was the practice, one would go down one side of the train, the other on the opposite side. (Rec. 253, 259.)

It was impossible for any man to inspect all trains, as some of them left so close together. (Rec. 257.)

Neither of these three inspectors could say that he inspected any particular train at any time, except that Burnham, who began work at Auburn July 25th, said that he inspected train 930 for three weeks. (Rec. 246, 252, 257.)

Therefore it is apparent that *if* any of the three witnesses who worked at Auburn actually inspected any of the trains involved in this case, *he only inspected the appliances on his side of the train.*

So the inspection of the appliances by defendant's *one witness* was extremely problematical, for Auburn was a busy terminal, especially in the morning, when the trains in question left there, as 2,500 cars a day moved in and out of Auburn. (Rec. 199, 200.)

RECONCILIATION OF POSITIVE AND NEGATIVE EVIDENCE.

It will thus be seen that the jury could only reconcile this testimony (even if we assume that one inspector of defendant might have inspected any car in question) by finding that the cars were

defective as alleged. For by so holding, the jury would simply be finding that the Government inspectors and defendant's one inspector testified to the truth, and that, in the case of the latter, he simply overlooked the defect, IF he inspected the car.

But, on the other hand, to hold that the cars were not defective would be, in effect, to find that the Government inspectors perjured themselves.

We do not mean by that that the Government inspectors are infallible, for they may have overlooked other defective cars, just as the one inspector for defendant, if he inspected any car in question, overlooked the defects complained of.

The testimony of the Government inspectors was too certain, to definite and positive to be the result of a mistake, and, being corroborated in part by defendant's records, was not susceptible of being misconstrued by the jury as reflecting a mistake in each instance; for if the Government inspectors saw other cars with defective appliances it would be a most peculiar coincidence or mistake that of the several million cars in the United States, they happened to write down, in each instance, the initials and numbers of three cars (the car in question and the cars to which it was coupled) that happened to be in that particular train.

All these facts, we believe, were inadvertently overlooked by this Court; and in justice to the Court, the Government, and the Government inspectors, we have felt in duty bound to request a rehearing and a reconsideration of the finding "that the verdict of

the jury was necessarily based on the defense that no cars with penalty defects were hauled by the defendant in error over its line as charged."

On the other hand, further to emphasize the picture put before the eyes of the jury through the large amount of irrelevant, sympathetic testimony, we would, as briefly as possible, refer the Court to some of the outstanding features of this testimony.

IRRELEVANT, SYMPATHETIC, PREJUDICIAL TESTIMONY.

We urgently request the Court to review this character of testimony, as set forth in the Government's Assignments of Error 13 to 26 (Rec. 329-341), which for the sake of convenience we herewith summarize. This evidence relates to—

Unusual burden at Centralia.

Acts of strikers or sympathizers in cutting air hose or knocking off grab irons after a train was made up at Auburn and Centralia.

Acts of strikers or sympathizers in cutting air hose, damaging angle cocks, and otherwise rendering equipment defective at Tacoma and Ellensburg, as well as Auburn and Centralia.

Act of cutting 22 air hose in one train.

Air hose being filled with waste; also steam hose.

Necessity for setting refrigerator cars on steam tracks to keep them from being filled up with waste.

Question of endurance so far as company concerned.

Everybody working constitutional limit.

Every nerve strained.

Insufficiency of men at Auburn to repair log cars hauled from there in train 930, which cars were not involved in this case.

Reason of Northern Pacific for not employing new men until about July 18th.

Danger of repairing cars on transfer or interchange track in Seattle (18th count).

Train crews trying to bluff officials about cars being defective, and being particular about taking out trains with defects.

Condition of car 67105 (8th count) when it left Auburn.

Efforts to employ men at Auburn.

Unreasonableness of making repairs on transfer or interchange track in Seattle (18th count).

Critical attitude of trainmen, and acts of brakemen in crawling under trains to find defects.

Interference from outsiders; and great deal of interference from people in employ of defendant.

Intention of trainmen to delay trains.

Other Brotherhoods doing everything to help strikers.

Malicious acts of unknown persons, in disconnecting uncoupling levers, pulling apart or cutting air hose, in bending off stirrups (sill steps), and opening angle cocks to prevent getting full air pressure, and in doing other acts of sabotage.

Treatment of officials by train crews.

Critical condition at Centralia.

Inability to get men at Centralia account reputation of I. W. W. center.

We do not feel that it is proper for us to refer to defendant's arguments to the jury, but, frankly, it is our belief that the court may very well consider how wide the door was opened to sympathetic, prejudicial argument by reason of the character of the above testimony.

Now, in the opinion of this Court, we find the following statement relating to this irrelevant testimony:

The consideration of testimony relating to conditions arising from the strike was expressly limited by the Court to the single question whether Centralia, Tacoma, and Auburn were available repair points during the period in question.

But such limitation, based on facts which had misled the Court, also misled the jury, for it suggested a right on defendant's part that it might haul defective cars from these points. But the trial Court overlooked the fact, just as this Court has, that Tacoma was not involved in this suit; that no defective car had been discovered at Centralia, or that it was being hauled therefrom for the purpose of being repaired; and that no evidence had been introduced by defendant to show, or even suggest, that it could not replace a small hand-brake wheel at Auburn.

But such express limitation could not possibly have the effect of pushing the water back over the dam, of clearing the minds of the jury of all false impressions, of all false issues; for, as we shall show,

the trial Court itself was misled by defendant's irrelevant testimony, and thereafter by its instructions impressed upon the jury's mind the Court's misconception of the issues.

TRIAL COURT MISLED BY TESTIMONY.

In convincing this Court that the trial Court was misled by the irrelevant testimony, and that as a result thereof it inadvertently misled the jury, we desire, first, to refer to the 18th cause of action.

In its opinion in this case this Court says:

Under the law defendant in error was forbidden to haul this car over its line any distance for any purpose, because the defect arose on the lines of another carrier.

This was the rule laid down by this Court in that other Northern Pacific case, 287 Fed. 780, which was decided long before the trial of the instant case, and it is no impropriety in saying that the trial Court's attention was called to this decision at the trial of the instant case.

Now, the trial Court would not have refused to follow the law as laid down by this Court had it not been misled by the irrelevant strike testimony, and in that connection we respectfully request this Court to note the attitude of defendant as to this cause of action.

Defendant introduced evidence to the effect that by reason of the strike a man's life would be in danger if he endeavored to repair the 18th count car on the interchange track, thus attempting to convey the

impression that had it not been for the strike this car would have been repaired before defendant moved it from this interchange track. This was most unfair, both to the Court and jury, and we can not escape the conviction that it was merely intended for sympathetic, prejudicial purposes; for after the Court below had been so misled as to direct a verdict on this 18th cause of action, and after such action had undoubtedly impressed itself on the minds of the jury, defendant came before this Court and, in effect, admitted that all the evidence about a man's life being in danger if he attempted to repair the car on the interchange track was wholly irrelevant and untrue, so far as his ever being required to do that work on the interchange track at any time. Therefore we regretfully, but unhesitatingly, again say that such testimony was intended only to mislead the Court and jury and to prejudice the Government in the eyes of the jury by the suggestion that the Government, in instituting and prosecuting this case, was insisting that the defendant should jeopardize the lives of men by requiring them to repair such a car on the interchange track.

And in defendant's brief, page 48, we find support of our statement, as follows:

The railway company, as a matter of law, could not have used this interchange track so located in a public street for repair purposes. Such purpose would be entirely inconsistent with its franchise grant and with the rights of the public to a joint use of the street.

This is followed on the next page by the statement that the trial Court would have stultified itself and the law had it not directed a verdict for defendant on this 18th cause of action.

It will thus be seen that the trial Court was woefully misled by defendant's evidence and suggestion, that by reason of the strike this interchange track had ceased to be a repair point, whereas it never had been and never would be.

The action of the trial Court in directing a verdict on this 18th cause of action undoubtedly had a strong effect on the jury, for the jury could not escape the conviction that the Court laid great stress on, and emphasized by its action, this irrelevant strike testimony.

We desire to give a few more instances of how the trial Court and jury were misled by defendant's irrelevant testimony.

The witness Weeks was asked the following question on cross-examination by defendant (Rec. 161):

Isn't it a fact that your attention was called to the fact that in the Centralia yard, the Auburn yard, and other yards of the Northern Pacific, after a train was made up and defects were repaired, either the strikers or sympathizers with the strikers would come along, cut the air hose, and knock off grabirons?

The Court overruled the Government's objections to this question, and added (Rec. 162):

The strike would have something to do with the nearest available repair point. It might

be considered by the jury as to whether the cars might not have been put out of order after the inspection before the train left the station.

Now, this had no reference to any cause of action; the answer of defendant simply denied that any car left Auburn or Centralia in the defective condition alleged; and there was not the slightest suggestion that any of the cars involved in the instant case were put out of order by strikers or sympathizers.

But the Court, undoubtedly assuming at that stage of the trial that such evidence might be introduced later on as to some of the cars in question, required the witness to answer the same, revamped by counsel as follows (Rec. 163):

You have testified that you had learned that there was a strike down at Centralia; I will ask you if your attention was not called, both at Centralia and Auburn—and if you were in the Tacoma yard, and in the Ellensburg Northern Pacific yard, and in Spokane—that after trains had been made up and the road engine had been attached, either the strikers or their sympathizers came along and cut the air hose, damaged the angle cocks, and otherwise attempted to render the equipment defective?

And the witness replied that he had heard such tales.

But thereafter defendant introduced no such evidence as to any car involved in this case; but the

trial Court, overlooking this fact, instructed the jury as follows (Rec. 308):

If the inspection is made withⁱⁿ a reasonable time before the train leaves and the company—the defendant—has no reason to apprehend that there is any movement of the train or that it is subjected to any condition that is going to put it out of repair after inspection before it has left, *if mischievous individuals for any reason after that inspection* inflict defects or damage upon the cars that result in penalty defects, the company would not be liable, * * *.

And all through the Court's instructions we find repeated references to defendant's right to haul the cars in question from Auburn and Centralia, provided they could not be repaired at those places; but this was all wrong.

So far as Centralia is concerned, no car in question was discovered to be defective at that point, and no car was being hauled from there for the purpose of being repaired.

As to cars hauled from Auburn, not a single one was being hauled for the purpose of repairing any defect complained of by the Government; and only in one instance was it claimed that a car had to be hauled from Auburn in order to repair some defects other than those complained of, but whether or not these other defects were penalty defects we do not know.

And so, with the above situation in mind, and with the further thought that the nearly 200 pages of

irrelevant strike testimony had beclouded the material facts supporting the real issues in the case, it was error for the Court, even inadvertently, to intensify this fogginess by certain instructions.

It was error for the Court to charge the jury that it might take the—

strike in account in determining whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective * * * and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points, and it would not be a violation of this ^{law} to move a car to a repair point and remedy the defects where that condition did not exist, or was not so acute, or where the friction was not so great. (Rec. 298.)

It was also error for the Court to give the jury the following instructions:

After the inspection, if it is made a reasonable time before the departure of the train, the train should be considered as upon the line, and the defendant would not become liable if it exercised that degree of care that I have indicated until it did discover the defects, when it would then again be its duty to repair wherever found if they could be repaired there; if they could not be repaired,

then to take them to the nearest available repair point and remedy the defects. (Rec. 309.)

The effect of this erroneous instruction can readily be seen, and particularly its fertility for sympathetic, prejudicial arguments based on irrelevant testimony.

It was error to refuse to charge the jury as follows, and the Court would no doubt have so charged had it not been misled by the testimony:

If the jury believes, from a fair preponderance of the evidence, that any car was hauled by defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the Government on any such cause of action.

The above was plaintiff's Request for Instructions No. 5, which the Court refused to give, *as requested*; for while the above words were used in instructing the jury, they were qualified and their effect destroyed by these words added thereto:

* * * unless moved for the purpose of being repaired, as I have explained to you. (Rec. 300.)

It was error and misleading for the Court also to charge the jury—

that it was the duty of the defendant railway company to use its best efforts to keep the commerce of the country moving and in determining the *disputed* questions of fact in this case [the existence of the defects to the cars in question] *that you have a right to take in consideration the surrounding circumstances*

and conditions as they existed at the times alleged in the complaint herein so far as the same have been established by the evidence.
(Rec. 307.)

These "surrounding circumstances" included the strike and the withdrawal of certain employees from the service.

ASSIGNMENTS OF ERROR.

All of the above were assigned as error.

And in connection with the question of fact relating to the existence of the defects in question, we would call the Court's attention to certain other Assignments of Error based on the exclusion of evidence offered by the Government and discussed in its brief; and as an example thereof, consider the 13th cause of action, discussed on page 70 (e) thereof.

CONCLUSION.

It is respectfully submitted that in view of the irrelevant testimony, and the Court's instructions, which resulted in a verdict, unsupported by any material, relevant testimony, a rehearing should be granted the plaintiff in error on the 16 causes of action as to which the judgment of the lower Court was affirmed.

THOS. P. REVELLE,

United States Attorney,

C. E. HUGHES,

Assistant United States Attorney,

M. C. LIST,

Special Assistant to the United States Attorney,

Attorneys for Plaintiff in Error.

DISTRICT OF COLUMBIA, ss:

M. C. List, being first duly sworn, deposes and says: That he is one of the attorneys of record for the plaintiff in error in the above entitled cause, and that he hereby certifies that, in his judgment, this petition for rehearing is well founded, and that it is not filed for purposes of delay.

M. C. LIST.

Subscribed and sworn to before me this 28th day of December, 1923.

[SEAL.]

A. HOLMEAD.



9

IN THE
United States
Circuit Court of Appeals
FOR THE
Ninth Circuit

TWOHY BROTHERS COMPANY, a corporation,	}	Plaintiff in Error,
vs.		
WALTER ROGERS,		Defendant in Error.

BRIEF ON BEHALF OF THE
PLAINTIFF IN ERROR.

RICHARD E. SLOAN,
C. R. HOLTON and
E. G. SCOTT,
Attorneys for Plaintiff
in Error.

United States
Circuit Court of Appeals
Ninth Circuit

TWOHY BROTHERS COMPANY, a corporation,	}	Plaintiff in Error,
vs.		
WALTER ROGERS,	}	Defendant in Error.

BRIEF ON BEHALF OF THE
PLAINTIFF IN ERROR.

This is a writ of error directed to the United States District Court for the Northern District of Arizona to review the judgment entered in said Court upon a verdict of a jury returned on the Twenty-fifth day of May, 1923 in favor of defendant in error and against the plaintiff in error.

STATEMENT OF THE CASE

This cause was originally instituted by the defendant in error in the Superior Court of the State of Arizona, in and for the County of Maricopa, on or about the Twenty-third day of April, 1921. Thereafter and within the time prescribed by law, upon a petition by plaintiff in error duly and regularly filed and the giving of bond, said cause was removed to the United States District Court for the District of Arizona upon the ground of diversity of citizenship, the defendant, Twohy Brothers Company, being a citizen and resident of a state other than the State of Arizona, i. e. a citizen and resident of the State of Oregon. The complaint as filed in said Superior Court of the State of Arizona, County of Maricopa, and as removed to said United States District Court alleged in substance that the defendant company was at the times mentioned therein engaged in the construction and building of public highways in the County of Maricopa, State of Arizona, and particularly that certain portion of the public highway known as the Indian School Road in said County and State. That the plaintiff was employed by said defendant and that his duties as such employee were to assist in connecting and making fast what is known and called in said business as a "bale" to cars or buckets loaded with sand, gravel and cement and to assist in guiding said bale and holding the same in its proper place while said sand, gravel and cement were being loaded into what is

known and called a "skiff", used for the conveyance of sand, gravel and cement to what is known as the "mixer." That on or about said date while plaintiff was about the course of his employment and without any negligence on his part, the plaintiff at said time and place received great and severe bodily strain and internal injuries, to-wit, a sprained back, a dislocation of the fifth lumbar vertebra, a severe rupture and hemorrhoids. That said injuries were caused solely by the neglect, fault, carelessness and negligence of the defendant company in this; that it did then and there at said time and place fail and neglect to properly place and locate said bale and said mixer in said highway as aforesaid, in that plaintiff was compelled in the performance of his regular duties and employment to push, haul and pull said bale. Said complaint further alleged that by reason of said injuries so received plaintiff suffered extreme bodily pain. That prior to the date of said injuries plaintiff enjoyed the best of bodily health and that since said injuries and as a consequence thereof plaintiff has been and is sick, sore and in ill health and unable to walk without assistance and without experiencing bodily pain and anguish and unable to engage in any gainful occupation and that he will remain forever maimed and crippled thereby. Said complaint prays damages in the sum of Twenty Thousand Dollars and for costs.

That on or about the Twenty-first day of May, 1921, the plaintiff filed with the Clerk of said

United States District Court what purported to be a first amended complaint containing two alleged causes of action; the first cause of action being a repetition of the allegations contained in plaintiff's original complaint, with a few minor and inconsequential changes which we do not deem necessary to note herein. Plaintiff's second cause of action in said amended complaint reiterated substantially the same facts and circumstances surrounding the accident complained of but charges that the occupation in which plaintiff was at said time engaged was hazardous as declared in Subdivision 10 of Section 3156, Chapter VI. Civil Code of Arizona, and specifically averred that said second cause of action was brought under what is known as the Employers' Liability Law of the State of Arizona. That said accident occurred while said plaintiff was engaged in and about the performance of his regular duties in and about said plant, machinery and appliances and that said accident arose out of and in the course of such duties, labor, service and employment and was due to a condition of such employment. That while so employed with his duties in and about said plant, machinery and appliances as aforesaid and while in the exercise of due care for his own safety and without carelessness or negligence on his part and while said plaintiff at said time and place was laboring under severe bodily and physical strain, to-wit, pushing, pulling and hauling upon said bale, which said bale was then and there connected with said car or bucket loaded with sand, gravel and

cement as aforesaid, he then and there met with the accident complained of. Plaintiff in his first amended complaint prays for judgment in the sum of Twenty Thousand Five Hundred Dollars.

That after the filing of said first amended complaint the defendant filed, among other pleadings, a motion to strike all of said second cause of action of plaintiff's first amended complaint upon the ground that the plaintiff having filed his original complaint under the common law had elected to pursue such remedy exclusively and that, therefore, the second cause of action of said first amended complaint being an attempt to charge liability on the part of the plaintiff in error under the Employers' Liability Law of the State of Arizona was surplusage and should be stricken. This motion to strike was by the Court denied and defendant in error was by an order of the Court duly entered granted leave to amend his complaint by adding a second cause of action under the Employers' Liability Law of the State of Arizona.

That thereafter and on or about the Twelfth day of December, 1921 the defendant in error filed a notice and motion for leave to amend together with an affidavit in support thereof, together also with his proposed second amended complaint. That said proposed second amended complaint was in all essential details a repetition of the second cause of action of the first amended complaint. It charges that the occupation in which defendant in error was employed at the time of his accident was hazardous as

declared and determined by Subdivision 10, Sec. 3156, Chapter VI, Civil Code of Arizona, 1913, and avers that said action is brought under said Section and Chapter. It differs from the second cause of action of the first amended complaint only in the allegations concerning the nature and severity of the injuries alleged to have been sustained. The second amended complaint omits entirely the first cause of action set forth in the first amended complaint, that is to say, it omits the cause of action under the common law based upon negligence, and attempts only to state a cause of action under the Employers' Liability Law of the State of Arizona.

The plaintiff in error objected to the filing of said amended complaint upon the ground that said defendant in error having brought his original action under the common law had thereby elected to prosecute his action under said law and was thereby excluded from amending by stating a cause of action under said Employers' Liability Law.

The Court, however, overruled said objection and entered its order permitting the defendant in error to file his proposed second amended complaint and giving the plaintiff in error ten days within which to answer said amended complaint.

Thereafter and on or about the Twentieth day of December, 1921 the plaintiff in error filed its motion to strike said second amended complaint upon the ground that said defendant in error had by bringing his original action under the common law, elected to pursue such remedy exclusively and was

precluded from amending his complaint so as to bring his action under said Employers' Liability Law, and that, therefore, said second amended complaint was wholly surplusage and should be stricken. Said motion to strike was by the Court denied.

Thereafter and on or about the 17th day of July, 1922 the defendant in error filed his notice and motion for leave to amend, together with an affidavit in support thereof, together also with his proposed third amended complaint, to which motion plaintiff in error filed written objections on or about the Twenty-fifth day of July, 1922, said objections by plaintiff in error being based upon the ground that the affidavit of defendant in error in support of his motion for leave to amend was insufficient to warrant the Court in granting said motion, that the third amended complaint did not conform nor was it in accordance with the affidavit in support of said motion, and upon the further ground that at the commencement of said action defendant in error elected by filing his complaint in the Superior Court of the State of Arizona in and for the County of Maricopa under the common law, to pursue such common law remedy exclusively and that defendant in error was bound by such election. The trial court, however, granted said motion to amend and made its order permitting the filing of said third amended complaint.

Beginning on or about the Twenty-first day of May, 1923, said cause was tried upon the third amended complaint before the Court and a jury and

on the Twenty-fifth day of May, 1923 said jury returned a verdict in favor of the defendant in error and against the plaintiff in error in the sum of \$5,250.00, and upon said last mentioned date judgment was rendered by the Court upon said verdict.

That at the beginning of the trial of said cause counsel for defendant in error announced that he was proceeding under the third amended complaint on file in said action, whereupon counsel for the plaintiff in error objected to the introduction of any evidence under said third amended complaint upon the ground that the action as originally commenced was based upon the alleged negligence of plaintiff in error and sought a recovery upon the theory of negligence, and that subsequently the complaint was amended in such manner that now under said third amended complaint, plaintiff seeks recovery under what is known as the Employer's Liability Law of the State of Arizona. An objection to the same effect was made by counsel for plaintiff in error at the beginning of the introduction of evidence by defendant in error, which objection was by the Court overruled and it was stated by the Court that said objection should go to all the testimony that was introduced and that the same ruling would be considered as having been made and excepted to.

Thereafter plaintiff in error moved for a new trial upon the following grounds:

That the court erred in admitting evidence over

the objection of the defendant and excepted to by the defendant.

That errors of law occurred at the trial and during the progress of the cause.

That the court erred in instructing the jury.

That the court erred in refusing instructions requested by the defendant.

That the verdict is not justified by the evidence and is contrary to law.

which said motion was on the Second day of June, 1923, overruled, and it is from the order overruling said motion for a new trial and from the judgment rendered in this case as aforesaid, upon which this writ of error is based.

ASSIGNMENTS OF ERROR.

ASSIGNMENT NO. I.

The Court erred in denying defendant's motion to strike from the files the second cause of action set forth in plaintiff's First Amended Complaint for the following reasons:

That the plaintiff, a workman, brought suit in the Superior Court of Maricopa County, Arizona, against the defendant, his employer, asking in his original complaint for damages for personal injuries alleged to have been sustained while in the service of such employer and based such action upon the alleged negligence of the defendant under the common law. An employee who is injured in the course

of his employment in what is designated by such law as a hazardous occupation has open to him three separate and distinct avenues of redress, any one of which he may pursue. They are: The common law liability for negligence; The Employers' Liability Law, and the Compulsory Compensation Law.

The law of the State of Arizona, however, provides that any suit brought by the workman for a recovery shall be held to be an election to pursue such remedy exclusively. The plaintiff having chosen to bring his action originally under the common law has, under the Arizona statute, elected to pursue that remedy exclusively and is precluded from a recovery under any of the other remedies theretofore open to him. The second cause of action set forth in plaintiff's First Amended Complaint attempts expressly to state facts bringing it within the Employers' Liability Law of the State of Arizona.

Inasmuch as plaintiff was precluded from a recovery under such Law the said second cause of action constitutes surplusage and should have been stricken and the Court erred in refusing to strike the same.

ASSIGNMENT NO. II.

The Court erred in denying defendant's motion to strike all of plaintiff's Second Amended Complaint from the files for the following reason:

In plaintiff's Second Amended Complaint he aban-

dons entirely his cause of action under the common law and seeks recovery entirely under the Employers' Liability Law of the State of Arizona. As shown in Assignment No. I. it is our theory that the plaintiff was precluded from bring his action under the Employers' Liability Law and for that reason his Second Complaint was surplusage and should have been stricken.

ASSIGNMENT NO. III.

The Court erred in denying defendant's motion to strike from the files plaintiff's Third Amended Complaint for the following reason:

Such Third Amended Complaint seeks recovery under the Employers' Liability Law. The only difference between the Second Amended Complaint and the Third Amended Complaint is a change in the amount sought and some difference in the injuries alleged to have been sustained. As stated in former assignments, our contention is that the plaintiff is precluded from bringing his action under the Employers' Liability Law and therefore his Third Amended Complaint constitutes more surplusage and should have been stricken.

ASSIGNMENT NO IV.

The Court erred in overruling defendant's objection to the introduction by the plaintiff of any testimony under said Third Amended Complaint for the reason that said objections were specifically based

upon the ground that the plaintiff having instituted suit against the defendant under the common law had made his election to pursue such remedy exclusively and was precluded under said Third Amended Complaint which, as above shown, was based upon the Employers' Liability Law of the State of Arizona.

ASSIGNMENT NO. V.

The Court erred in refusing to give the following instruction requested by the defendant;

The plaintiff having failed to prove his case, you are instructed to return a verdict for the defendant.

for the following reason:

The plaintiff announced at the opening of the case that he was proceeding to trial upon the Third Amended Complaint, and in truth and in fact did proceed during the trial upon said Third Amended Complaint, which said Amended Complaint was, as above shown, based upon the Employers' Liability Law of the State of Arizona and not upon the common law of the State of Arizona and not upon the common law liability.

That the plaintiff having offered no evidence in support of his action originally instituted under the common law should not be permitted to recover under proof of facts set forth in his complaint based upon the Employers' Liability law, for the reason

that under our theory of the case plaintiff was precluded from pursuing any remedy other than that originally adopted and therefore the Court erred in refusing the instruction for a directed verdict.

ASSIGNMENT NO. VI.

The Court erred in instructing the jury in the following language:

The action is based upon what is known as the Arizona Employers' Liability Act.

Under the Arizona Employers' Liability Act, the plaintiff, in order to recover, must show; first, that the plaintiff was in the employ of the defendant; second, that the master was engaged in one of the hazardous occupations which I will explain to you by reading the Arizona statutes upon the subject, and that the employment by the master of the servant, that is, the plaintiff in this case, was in such a hazardous occupation.

Under the law of the State of Arizona, the Employers' Liability Act, the labor and service of a workman at manual and mechanical labor in the employment of any person, firm, association, company or corporation in mills, shops, works, yards, plants and factories where steam, electric or any other mechanical power is used to operate machinery and appliances in and about such premises is service in a hazardous occupation within the meaning of said Em-

ployers Liability Act. The Employers' Liability Act covers other occupations but you are concerned solely with the question as to whether or not the plaintiff was employed by the defendant and engaged in labor and service in and about a plant, works or yards where mechanical power was used to operate machinery and apparatus in and about such premises.

and in further instructing the jury as follows:

Prior to the passage of the Employers' Liability Act, the master was liable only where the master had been guilty of some negligence. Otherwise, there was no liability. Under the Employers' Liability Act, that law has been changed and in order for a plaintiff to recover, he does not have to show that his injury, if any injury is proved, was caused by an accident due to the negligence of the master(defendant). In other words, in this case, in order to entitle the plaintiff to recovery, it is not necessary that the plaintiff should prove that the defendant, Twohy Brothers, was negligent in some manner or form.

and in further instructing the jury as follows:

You are instructed, gentlemen of the jury, that if you find from a preponderance of the evidence that on or about the 25th day of March, 1921, the plaintiff, Walter Rogers, was

in the employ of and was employed by the defendant, Twohy Brothers, at and in their mill, shop, works, yard, plant or factory where mechanical power was used, as heretofore stated and defined in the Employers' Liability Act of Arizona, and that his duty under such employment required him to be in and about such place and in the performance of his duty under such employment the said Walter Rogers, without any negligence on his part, received any personal injury, as alleged in his complaint herein, which injury was occasioned by an accident arising out of and in the course of his labor, service and employment and was due to a condition or conditions of plaintiff's occupation or employment, then the court instructs you that under those facts, if you find them to be facts, that plaintiff is entitled to a verdict against the defendant in some amount of money which would be reasonably sufficient in dollars and cents to compensate the plaintiff for the injuries thus sustained by him.

for the reason that all of the foregoing instructions are based upon the Employers' Liability Law. The plaintiff having brought his action originally under the common law and by so doing having elected to pursue such remedy exclusively is not entitled to a recovery under the Employers' Liability Law. The foregoing instructions being based entirely upon

the Employers' Liability Law and directing a recovery upon proof of such facts were erroneous.

ARGUMENT.

All of the foregoing assignments of error will be considered together for the reason that they all go to the same basic principle, i. e., that the defendant in error having instituted his suit for damages for personal injuries under the common law, thereby made his election of remedies and was excluded from changing his action, and that the Court in permitting an amendment whereby he substituted an action under the Employers' Liability Law, and in permitting him to go to trial upon such action and in rendering judgment thereon, committed errors which impel a reversal of this action.

REMEDIES OF A WORKMAN WHEN INJURED WHILE EN- GAGED IN AN OCCUPATION DECLARED AND DETERMINED TO BE HAZARDOUS.

It becomes necessary to determine what actions were available to the defendant in error before he instituted his suit, and in so doing an examination of the Constitution of the State of Arizona and the statutes enacted in conformity with certain mandates therein, is enlightening.

Article XVIII of the Constitution of the State of Arizona is entitled "Labor" and contains all of the

organic law of the State of Arizona upon that subject.

Section 7 of said Article XVIII of the Constitution contains a mandate requiring the Legislature to enact an Employers' Liability Law, and reads as follows:

“SECTION 7. To protect the safety of employees in all hazardous occupations, in mining, smelting, manufacturing, railroad or street railway transportation, or any other industry the Legislature shall enact an Employer's Liability law, by the terms of which any employer, whether individual, association, or corporation shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.”

Section 8 of said Article contains a mandate requiring the Legislature to enact a Workman's Compulsory Compensation law, and reads as follows:

“SECTION 8. The Legislature shall enact a Workmen's Compulsory Compensation law applicable to workmen engaged in manual or mechanical labor in such employments as the

Legislature may determine to be especially dangerous, by which compulsory compensation shall be required to be paid to any such workman by his employer, if in the course of such employment personal injury to any such workman from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee, or employees, to exercise due care, or to comply with any affecting such employment; Provided, that it shall be optional with said employee to settle for such such compensation, or retain the right to sue said employer as provided by this Constitution."

EMPLOYERS LIABILITY LAW.

Complying with the mandate contained in Section 7, above quoted, of the Constitution, the Legislature of the State of Arizona enacted Chapter VI Title 14, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law of the State of Arizona, being Sections 3153 to 3162 inclusive, Revised Statutes of Arizona, 1913.

Section 3153 declares the act to be an Employers' Liability Law as prescribed by Section 7, Article XVIII of the State Constitution.

Section 3154 is as follows:

“That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.”

Section 3155 is as follows:

“The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the

workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein."

Section 3156 enumerates the various occupations declared to be hazardous within the meaning of the Act.

Section 3157 requires the employer to adopt rules for the safety of employees.

Section 3158 is as follows:

"3158 When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or, in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal

representative for the benefit of the estate of the deceased.”

Section 3159 modifies the defenses of contributory negligence and assumption of risk.

Section 3160 makes contracts against liability void.

Section 3161 provides the rate of interest pending appeals.

Section 3162 fixes the limitation of actions under the act to two years.

WORKMEN'S COMPULSORY COMPENSATION LAW.

Complying with the mandate contained in Section 8, above quoted, of the Constitution, the Legislature enacted Chapter VII, Title 14, of the Revised Statutes of Arizona, 1913, being Sections 3163 to 3179 inclusive, of said Statutes.

Section 3163 declares the act to be a Workman's Compulsory Compensation Law as provided by Section 8, Article XVIII of the State Constitution.

Section 3164 is as follows:

“3164. Compulsory compensation shall be paid by his employer to any workman engaged in any employment declared and determined as in the next section hereof (as provided in Sec. 8 of Article XVIII of the State Constitution) to be especially dangerous, whether said employer

be a person, firm, association, company, or corporation, if in the course of the employment of said employee personal injury thereto from any accident arising out of, and in the course of, such employment is caused in whole, or in part, or is contributed to, by a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its officers, agents, or employee or employees, to exercise due care, or to comply with any law affecting such employment."

Section 3165 enumerates the various employments declared to be especially dangerous within the meaning of the act.

Section 3166 is as follows:

"3166. In case such employee or his personal representative shall refuse to settle for such compensation (as provided in Sec. 8 of Article XVIII of the State Constitution) and chooses to retain the right to sue said employer, (as provided in any law provided for in Sec. 7, Article XVIII of the State Constitution) he may so refuse to settle and may retain said right."

Section 3167 refers to the degree of care to be exercised by employers in protecting the safety of employees.

Section 3168 declares the common-law doctrine

of no liability without fault to be abrogated in Arizona insofar as it shall be sought to be applied to accidents mentioned in the Act.

Section 3169 is as follows:

“3169. When, in the course of work in any of the employments described in the third section above, personal injury by accident arising out of and in the course of such labor, service, or employment, is caused to or suffered by any workman engaged therein, by any risk or failure specified in section 66 (Par. 3164) hereof, then such employer shall be liable to and must make and pay compensation to the workman injured, and his personal representative, when death ensues, for the benefit of the estate of the deceased, for such injury at the rates and in the manner hereinafter set out in this chapter;

Provided, that the employer shall not be liable under this chapter in respect of any injury which does not disable the workman for a period of at least two weeks after the date of the accident from earning full wages at the work at which he was employed, at the time of the injury; and provided, further, that the employer shall not be liable under this chapter in case the employee refuses to settle for such compensation and retains his right to sue as provided in section 68 (Par. 3166) of this title.”

Section 3170 prescribes the schedule of compensation to be paid under the Act.

Section 3171 relates to medical examinations of injured workmen.

Section 3172 relates to the notice to be given by the workman of injuries.

Section 3173 relates to arbitration of claims and to the reference of such claims to the Attorney General of the State and to the method of bringing suit for compensation.

Section 3174 refers to the preferential character of claims of workmen and provides that such claims shall not be subject to execution or attachment and shall not be assignable by the workman.

Section 3175 provides for the procedure in case the workman be mentally incompetent.

Section 3176 is as follows:

“3176. This chapter shall be construed as a continuation of the law contained in Chapter XIV of the laws of the First Legislature of the State of Arizona, Second Session. All workmen employed by an employer at manual and mechanical labor of the kinds defined in section 67 (Par. 3165) of this chapter shall be deemed and held in law to be employed and working subject to the provisions of this chapter, and the employer and the workman shall alike be bound by and shall have each and every benefit and right given in this chapter the same as if a

mutual contract to that effect were entered into between the employer and the workman at any time before the happening of any accident. It shall be lawful, however, for the employer and workman to disaffirm an employment under the provisions of this chapter by written contract between them or by written notice by one to and served upon the other to that effect before the day of the accident;

Provided, such written contract does not provide for less compensation than as provided in this chapter. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this chapter; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this chapter;

Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State Constitution, or the common law, except as herein provided, as his rights may at the time exist. .Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively."
(Italics ours)

Section 3177 is as follows:

“3177. Any employer employing workmen to perform labor or services of other kinds than as defined in this chapter, and such workmen and employees may, by agreement, at any time during the employment, accept and adopt the provisions of this chapter as to liability for accident, compensation, and the methods and means of paying and securing and enforcing the same. And in every such case the provisions of this chapter shall be taken in law and fact to bind the parties as fully as if they were specifically mentioned and embraced in the provisions of this chapter.”

Section 3178 is as follows:

“3178. This chapter is remedial in its purpose and shall be construed and applied so as to secure promptly and without burdensome expense to the workman the compensation herein provided and apportioned so as to provide support during the periods named for the loss of ability to earn full wages.”

Section 3179 is as follows:

“3179. Nothing in this chapter shall be deemed or taken to repeal or affect in any way any other acts or laws passed by the first legislature of the State of Arizona, and in so far as

refers to the same subject in other acts it shall be deemed to be cumulative only."

Construing these statutes the Supreme Court of the State of Arizona has said:

"Under the laws of Arizona, an employee who is injured in the course of his employment has open to him three avenues of redress, any one of which he may pursue according to the facts of his case. They are: (1) The common-law liability relieved of the fellow-servant defense and in which the defenses of contributory negligence and assumption of risk are questions to be left to the jury. Const., secs. 4, 5, art. 18. (2) Employers' liability law, which applies to hazardous occupations where the injury or death is not caused by his own negligence. Const., sec 7, art. 18. (3) The compulsory compensation law, applicable to especially dangerous occupations, by which he may recover of the employer. Const., sec. 8, art. 18." Consolidated Ariz. S. Co. vs. Ujack 15 Ariz. 382; 138 Pac 465.

The foregoing construction by the Supreme Court of the State of Arizona of the laws relating to the remedies of an injured workman has not been changed nor modified by that tribunal, and it is, therefore, safe to proceed upon the hypothesis that the injured workman has, assuming that he re-

ceived his injuries while engaged in a hazardous occupation as declared and defined by the law, the three remedies above named from which to choose. It remains to be seen when and in what manner the workman is required under the law to elect which of the three remedies he will pursue and when such election becomes final and conclusive.

*THE BRINGING OF A SUIT IS
THE DECISIVE ACT WHICH CON-
STITUTES AN EXCLUSIVE ELEC-
TION OF REMEDIES.*

The provisions of the constitution are silent as to when an election shall be made, except insofar as such election may be affected by the following language found in Section 8, Article XVIII of the Constitution.

“Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution.”

Section 14 of the Workman's Compulsory Compensation Act, being Paragraph 3176 of the Revised Statutes of Arizona, 1913, reads as follows:

“Sec. 14. This act shall take effect on the 1st day of September, 1912; and ten days from and thereafter, it shall be taken and held in law that all workmen then in the employ, and

all workmen afterward employed by an employer at manual and mechanical labor of the kinds defined in section 3 of this act, are employed and working under this act, and the employer and workman shall alike be bound by and shall have each and every benefit and right given in this act the same as if a mutual contract to that effect were entered into between the employer and the workman at any time before the happening of the accident. It shall be lawful, however, for the employer or workman to disaffirm an employment under the provisions of this act by written contract between them, or by written notice by one to, and served upon, the other to that effect before the day of the accident; provided, that such written contract does not provide for less compensation than as provided in this act. And in the absence of such written contract or written notice, served as above provided, it shall be taken and held that the employment and service is under this act; and the same shall be the sole measure of their respective rights and liabilities when and as provided in this act; provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this act or to proceed under or rely upon the provisions hereof for relief, *then the other may pursue his remedy or make his defense under other existing statutes, the state Constitution or the common law, except as here-*

in provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively." (Italics ours)

It is apparent from a reading of the last quoted section that it was the intention of the legislature to make the provisions of the Workman's Compulsory Compensation Law a part of the contract of employment between the employer and employee, where the work engaged in was hazardous as defined by said Workman's Compensation Act, unless either the employer or employee should by a written notice, disaffirm any intention of coming within such Act.

However, it has been determined by the Supreme Court of the State of Arizona in the case of Consolidated Ariz. S. Co. v. Ujack, *supra*, that any expression in the Workman's Compulsory Compensation Act that seemingly requires that the employee shall elect in advance of his injury his remedy, is unconstitutional in the light of the language found in Section 8, Article XVIII of the Constitution, reading as follows:

"Provided, that it shall be optional with said employee to settle for such compensation, or retain the right to sue said employer as provided by this Constitution."

We may, therefore, consider it to be settled law that the injured workman has a constitutional right

after he has been injured, to either accept the compensation prescribed by the Workman's Compulsory Compensation Act or to sue his employer as provided by the Constitution,—that is, either at common law or under the Employers Liability Law.

In taking this view of the rights of the workman we find that the Legislature in the last part of Section 14 of the Workman's Compulsory Compensation Act, above quoted, provides as follows:

“Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.”

This language is in consonance with the provisions of the Constitution and clearly and unequivocally states when and in what manner an election shall be made and the effect of such an election. The bringing of a suit is an election by the workman. The effect of such election is to exclude all other remedies. This language of the statute is so simple and clear as to require no construction by the courts.

However, the Supreme Court of the State of Arizona is discussing the question of election in the case of Consolidated Ariz. S. Co. v. Ujack, *supra*, in an opinion written by Judge ROSS has the following to say:

“The last sentence of Section 14 reads:

‘Any suit brought by the workman for a re-

recovery shall be held as an election to pursue
 tains a plain declaration of the Legislature that
 such remedy exclusively." This sentence con-
 the employee is at liberty to pursue any of the
 remedies provided by law until he adopts one by
 instituting a suit for redress, when the one
 adopted becomes exclusive'."

And Judge CUNNINGHAM in an opinion dissent-
 ing in part in the foregoing case, uses the following
 language:

"If, after the accident, he fails to claim the
 statutory compensation in the manner and
 within the time prescribed, and if he has
 claimed the compensation and fails to show
 that the employer and he have failed or re-
 fused to adjust all questions that have arisen
 between them in one of the modes prescribed,
 such failures to make due claim or to settle the
 questions clearly operate as defenses, *but the
 commencement of such suit shall be held an
 election to pursue such remedy exclusively, and
 no other remedy is thereafter available to him.*
 (Italics ours) If, upon the other hand, he com-
 mences an action for the recovery of damages,
 without regard to the provisions of the act,
 then he is not permitted to abandon such suit
 and resort to his statutory remedy to enforce
 the compensation prescribed by the act."

Prior to the adoption of the Constitution of the State of Arizona the injured workman was limited in his recovery to the remedy afforded under the common law based upon negligence of the employer, and subject to the defenses afforded by that law to such employer. By the adoption of the Workman's Compulsory Compensation Law and the Employers' Liability Law, the workman engaged in a hazardous occupation was given remedies theretofore unknown to our law, and remedies not based upon any wrong upon the part of the employer, and subject to no defenses save the defense that the injury was caused by the negligence of the injured.

However, the new remedies granted to the workman, being strictly statutory in character, the workman must bring himself within the clear provisions of the law before he will be permitted to recover under the statutory remedy.

In this instance, the statute in express language and without conditions or limitations attached to the rule, says, that the bringing of an action constitutes an election and that this election is conclusive. The defendant in error by his own voluntary act excluded the remedy afforded by the Employers' Liability Law from the remedies available by electing to bring suit under the common law.

*STATUTE DECLARING BRINGING OF
SUIT AN ELECTION OF REMEDY IS
MERELY DECLARATORY OF RULE
GENERALLY ADOPTED.*

The Legislature of the State of Arizona in declaring by the statute above mentioned that the bringing of a suit should constitute an election of one of the co-existing remedies merely adopted the rule generally recognized. It has been held by numerous courts that the commencing of an action to enforce one of two or more remedial rights arising out of the same facts is such a decisive act as constitutes a conclusive election barring a subsequent prosecution of inconsistent remedial rights.

Eilers Music House v. Douglass,
156 Pac. 937. (Wash.)

Grizzard v. Fite,
191 S. W. 969. (Tenn.)

Frisch v. Wells,
86 N. E. 775. (Mass.)

Stinson v. Sneed,
163 S. W. 989 (Tex.)

Farwell v. Myers,
26 N. W. 328. (Mich.)

Missouri Pac. Ry. Co. v. Henrie,
65 Pac. 665 (Kan.)

Blaker v. Morse,
55 Pac. 274. (Kan.)

Sweet v. Montpelier Sav. Bk. & T. Co.
77 Pac. 538, (Kan.)

Robb v. Vos,
15 S. Ct. 4;
155 U. S. 13.

City Nat'l Bank of Saratoga Springs v. Wetsel,
88 N. Y. S. 1079. (N. Y.)

Wright-Barrett & Stilwell Co. v. Robinson,
82 N. W. 632 (Minn.)

Kennedy v. Manry,
66 S. E. 29 (Ga.)

Blank v. Independent Ice Co.,
133 N. W. 344 (Iowa.)

*NO SHOWING MADE BY DEFENDANT
IN ERROR IN EFFORT TO ESCAPE
THE EFFECT OF HIS ELECTION BY
BRINGING SUIT UNDER THE COM-
MON LAW.*

We contend that the language of the statute when it says "any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively," admits of no qualifications or exceptions and that one who voluntarily brings a suit at common law thereby makes his exclusive election and cannot thereafter by amendment or otherwise, substitute any other action for the one brought.

However, it may be contended that where the suit is brought under a misapprehension of the facts or of the law that the plaintiff should have a right to rectify such mistake by substitution of causes of action. While we do not agree that there is any such right under a statute where the language is so clear and explicit as we find here, yet we say

that even if such be the law, the defendant in error has not brought himself within the requirements of the law with respect to such substitution. A careful analysis of the facts related in the several amended complaints shows conclusively that there was no material difference insofar as the facts surrounding the injury are concerned, between the original complaint filed under the common law and the several amended complaints. Furthermore, the defendant in error was in as good a position to know of the facts and circumstances at the time he filed his original complaint based upon the common law, as he was at any subsequent time. He was not dependent upon anyone other than himself for his knowledge of the facts and circumstances. At the time he filed his original complaint these facts and circumstances were fresh in his memory. Furthermore, at no time or place has the defendant in error alleged either in his pleadings or affidavits in support of his amendments that he acted in ignorance of either the facts or the law, except that defendant in error claimed to be in ignorance of the character and severity of the injuries received, and upon such lack of information asked the privilege of amendment. This lack of information, of course, has no bearing upon his right of recovery. We believe it to be the rule upheld by authority and supported by reason that to escape the effect of an election made by bringing suit, it is incumbent upon the one seeking to do so to show that at the time of the institution of the suit he was ignorant of either the facts

or the law. *Baker v. Brown Shoe Co.*, 95 S. W. 808.

A party having two inconsistent remedies is bound by an election made with full knowledge of the facts and cannot thereafter pursue the other remedy merely because it promises better results. *Blaker v. Morse*, 55 Pac. 274. (Kan.)

*ELECTION OF REMEDIES
INVOLVES SUBSTANTIAL
RIGHTS.*

The substitution of a cause of action under the Employers' Liability Law of the State of Arizona for an action originally commenced under the common law is not a mere technical change. The two actions are greatly different.

The liability under the Employers' Liability Law is strictly statutory and involves no wrong on the part of the employer and is not based upon negligence in any degree. Proof of contributory negligence on the part of the employee does not act as a bar to a recovery but may be shown only for the purpose of mitigation of damages. Under the Employers' Liability Law there is no defense available to the employer save and except the fact that the accident was caused by the negligence of the employee.

Under the common law in the State of Arizona proof of negligence on the part of the employer is necessary and the right of recovery of the employee is subject to all of the common law defenses, save

and except the fellow servant defense. We, therefore, say that the matter of election is one of utmost importance.

CONCLUSION.

In conclusion we earnestly contend for the reasons above stated that the trial court by permitting a substitution of a cause of action under the Employers' Liability Law of the State of Arizona for a cause of action under the common law, and in permitting the defendant in error to go to trial upon such cause of action, and in rendering judgment thereon, committed errors which entitle the plaintiff in error to a reversal of this action.

Respectfully submitted,

RICHARD E. SLOAN,

C. R. HOLTON and

E. G. SCOTT,

Attorneys for Plaintiff in Error.

4011

IN THE

United States

Circuit Court of Appeals

FOR THE

Ninth Circuit

TWOHY BROTHERS COMPANY, a Corporation,	}
Plaintiff in Error,	
vs.	
WALTER ROGERS,	}
Defendant in Error.	

BRIEF IN BEHALF OF DEFENDANT
IN ERROR.

FRED C. BOLEN,
SPENCER B. PUGH, and
WIN WYLIE,

Attorneys for Defendant in
in Error.

United States
Circuit Court of Appeals
Ninth Circuit

TWOHY BROTHERS COMPANY, a Corporation,	}	Plaintiff in Error,
		vs.
WALTER ROGERS,		Defendant in Error.

BRIEF IN BEHALF OF DEFENDANT
IN ERROR.

ARGUMENT

We do not controvert the Statement of the Case as set out in the brief of Plaintiff in Error, but agree that the same is a fair presentation of all matters now in issue before this Court.

Plaintiff in Error has presented Six assignments of error, all and each of which raise the same point and question of law from separate angles and in Six different ways.

The transcript in this cause shows that the original complaint was filed by the Defendant in Error in the Superior Court of Maricopa County, State of Arizona, on the 23rd day of April, 1921, petition for removal filed May 9th, 1921, and that the order of removal was entered on May 14th, 1921, and that the cause went to the United States District Court of Arizona by filing the transcript therein on May 21st, 1921, AND THAT ON THE SAME DAY THE FIRST AMENDED COMPLAINT, NOW ATTACKED, WAS FILED IN THE UNITED STATES DISTRICT COURT, and that the plaintiff in error was not required to and did not file his answer in said cause until the 17th day of June, 1921, twenty-seven days after the filing of said amendment, thus showing that the plaintiff was diligent in asserting his right and certainly not causing the defendant in said cause to suffer any inconvenience or disadvantage.

The question is whether the plaintiff below, after having filed a complaint for negligence at common law involving the same facts, had a right, after a petition for removal was filed, but before time to answer in the Federal Court had expired, to amend by adding an additional count under the Employers Liability Law of Arizona and to later, before the calling of the cause for trial, elect to proceed under the new count; or whether the original filing of the complaint in itself constituted an election precluding a reliance upon the Statutory remedy.

This is the only issue before this court as admitted in the first paragraph of the argument in the brief of plaintiff in error (page 16).

At the outset, it might be well to call the Court's attention to the fact that the Arizona Statute provides an EMPLOYERS LIABILITY LAW, so called, and a COMPULSORY COMPENSATION LAW, and that they have entirely separate contents and were enacted for entirely separate purposes, the former being Chapter VI and the latter Chapter VII of the Revised Statutes of Arizona, 1913.

The former provides for a suit at law for injuries received and the latter provides compensation at a certain rate in case the injured employee ELECTS to accept such compensation.

Counsel for plaintiff in error take all of their vital quotations from the last mentioned compensation Statute. Their quotation set out on the bottom of Page 25 of their brief, to-wit: "Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively," from Paragraph 3176, Chapter VII, which is a part of the compulsory compensation act, they even italicise the same quotation at the bottom of page 29 of their brief. On page 31 of the same brief, and later from a dissenting opinion of Judge Cunningham which is referred to on page 32 of said brief. Counsel have evidently become confused as to the contents and purposes of these two separate and distinct chapters of Arizona law, not

realizing apparently that one chapter provides a remedy by suit at law and the other a settlement out of court.

This action was prosecuted under the *Employers Liability Law* as provided in Chapter VI aforesaid, and we find no provision whatsoever in that chapter as to election and we are therefore compelled to resort to the established rules as to election of remedies to determine whether or not the plaintiff below was precluded from proceeding under the Employers Liability Law by reason of the fact that he had first filed an action at law under the common law for negligence.

Upon the question of the election of remedies, besides citing several times over the Arizona Compensation Statute (Italicised), and a dissenting opinion, counsel has cited thirteen (13) cases from other states. All of these cases cited we have examined and we earnestly submit to the court that not a single one of these cases hold that there is an election by the mere filing of a complaint, but that in each and every one of these cases, the election was based upon a full or partial pursuit of one of the co-ordinate remedies to a final conclusion.

We consider that if under the rulings of the Supreme Court of the State of Arizona an action at common law for negligence and an action under the employers Liability Act can be joined and prosecuted up to the time of the submission to the jury, and the right of election to that time, then the rem-

edies are co-ordinate and one may be substituted for the other.

THE LAW ON THIS POINT AS DECLARED
BY THE SUPREME COURT OF THE STATE
OF ARIZONA.

The regular practice in Arizona, apparently approved by the Arizona Supreme Court, has been to join an action under the Employers Liability Law, and one for negligence in the same complaint.

In the cause of Arizona Eastern R. R. vs. Matthews, 20 Ariz. 282. These two causes were joined and in the opinion of the Court (page 284) it is set out that at the close of the plaintiff's case in chief the defendant moved the Court to require him to elect whether he would ask a recovery under the Employers Liability Act or under the Common Law. Whereupon, the defendant announced, without any ruling of the Court, his election to recover under the Employers Liability Act. The case then proceeded under the Employers Liability Act, and while no assignment of error seems to have been made, yet the practice was apparently approved.

In the cause of Jerome Verde Copper Company vs. Riley, 21 Ariz. 655, the same joinder of actions was made. The first assignment of error objected to the complaint upon the ground that it joined an action under the Employers Liability Law with an action under the Common Law of Negligence. In this case the Court has apparently approved this practice of joinder of these actions, though the

direct question was evaded by the following statement in the opinion, to-wit:

“Conceding, for the present purposes, that the appellant’s contentions thus made are borne out on the record, yet the minutes of the court disclose that after the plaintiff had submitted his evidence in chief, he moved to dismiss the action as to the Diamond Drilling Company, and the order was granted and said defendant was dismissed. Clearly, the appellant’s objections were thereby sustained and the defects of the complaint were cured. We are unable to see in what manner the appellant was prejudiced from the ruling of the court. Its special demurrers were sustained in effect before the trial was finished. The plaintiff was relegated to his common-law remedy, thereby disposing of one cause of action improperly joined, if, in fact, such misjoinder existed.”

We take the liberty also of referring to the opinion of the Hon. Wm. H. Sawtelle set out on pages 101 to 103, Transcript of Record, in which he discusses the Arizona rule as to Amendments. The liberal Statute of Arizona as to Amendments referred to in Section 422, Revised Statutes of Arizona, 1913, is as follows:

“All pleadings or proceedings may upon leave of the court be amended at any stage of the action within such time as the court may

prescribe, or they may be amended before trial without such leave upon serving the adverse party with a copy of such amended pleadings or proceedings."

CONCLUSION.

Counsel for Plaintiff in Error, in presenting this appeal to this Honorable Court, have cited no decision in the State of Arizona which condemns the practice under the Arizona Statute of joining these two actions, or of amending or substituting one for the other, or of electing between the two causes at the time of submission of the cause. They have presented to this Court copious and repeated quotations from the Arizona Compulsory Compensation Act (under which this action has not been prosecuted). Though, in view of the opinions in the two Arizona cases above cited and also the cause of *Calumet and Arizona Mining Company vs. Chambers*, 20 Ariz. 54 (cited by Judge Wm. H. Sawtelle in his opinion above referred to), the eminent counsel for the Plaintiff in Error must have full knowledge of the Arizona practice of joining these two counts as co-ordinate at any time up to the final submission of the cause, we therefore earnestly submit that the Plaintiff in Error is amenable to those penalties prescribed by Section 3161, Chapter VI, Revised Statutes of Arizona, 1913, being the Act under which this action is prosecuted, and which reads as follows:

Sec. 3161. In all actions for damages brought under the provisions of this Chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

We therefore earnestly submit that the action of the Arizona District Court should be sustained and judgment directed for the Plaintiff in Error for the full amount of the original judgment and costs, together with interest thereon at the rate of twelve per cent from the date of the original filing of suit until the judgment is paid.

Respectfully submitted,

FRED C. BOLEN,

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WIN WYLIE,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE UNITED STATES OF AMERICA on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff in Error,

VS.

C. L. BABCOCK, as State Treasurer of the State
of Washington,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Western District of Washington,
Southern Division.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4115.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendant and Respondent.

Petition and Affidavit for Writ of Mandamus.

To the Honorable Judge of the above-entitled
Court:

Comes now the plaintiff and relator, above named,
and complaining of the above-named defendant and
respondent, alleges and says:

I.

That the above-named plaintiff is the duly appointed, qualified and acting Alien Property Custodian of the United States of America, appointed by the President of the United States under and by virtue of an act of Congress of the United States of America, known as the "Trading with the Enemy Act," passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary thereto, possessing all the powers

granted by said acts of Congress and the executive orders issued in pursuance thereof.

II.

That at all times since the first day of January, 1923, the defendant C. L. Babcock was and he is now the duly appointed, qualified and acting State Treasurer of the State of Washington, and it is a part of his duties as such State Treasurer to pay warrants which have been duly drawn by the [2] Auditor of the State of Washington upon the "Accident Fund" and issued to the holders thereof, upon vouchers presented to said Auditor by the officers of the Department of Labor and Industries or their predecessors in interest.

III.

That the said defendant and respondent is an inhabitant of this judicial district.

IV.

That the plaintiff is the holder of certain warrants against the "Accident Fund" of the State of Washington, which were issued to him by the Department of Labor and Industries under a judgment of this court and of the Circuit Court of Appeals for this district, in the case of Thomas W. Miller, Alien Property Custodian, vs. Edward Clifford, et al., a full and complete list of which warrants is hereto attached, marked Schedules "A" and "B," and made a part hereof, which said schedules of warrants show the number of said warrants, date thereof, the name of the payee, and the amounts;

V.

That all the warrants described in Schedules "A" and "B" and the claims represented thereby were demanded by this plaintiff of the Department of Labor and Industries in the year 1917 or 1918, but were unlawfully withheld from him by the Department of Labor and Industries of the State of Washington until after the decision of this court and the Circuit Court of Appeals in the above-entitled action, and plaintiff did not receive the said warrants until about the 15th day of May, 1923; that all the said warrants and the claims represented thereby are due to former Alien Enemies or the Allies of Alien Enemies of the United States of America, and plaintiff is entitled to the said warrants and the said funds under the "Trading with the Enemy Act," so-called, and was awarded them by the order [3] of this court and of the Circuit Court of Appeals;

V.

That on the 26th day of May, 1923, the above-named plaintiff and relator duly presented said warrants to the said defendant and respondent, offering to surrender the same upon the payment thereof, and the said defendant and respondent refused to pay the same or any of them;

VI.

That since the passage of the "Trading with the Enemy Act," above referred to, up until the 21st day of November, 1921, all statutes of limitations were suspended on account of the war existing between the United States of America and the Royal

German Government, the Royal Austro-Hungarian Government, and the Kingdom of Bulgaria;

VII.

That plaintiff desires the payment of said warrants that he may collect the same and distribute the funds represented thereby to those who shall be designated by act of Congress to be entitled thereto, and that he may perform his duties as an executive of and representing the President of the United States and carry out the treaty obligations of the United States of America with the foreign governments whose subjects are interested therein.

VIII.

That the act of said defendant and respondent in refusing to pay the said warrants is arbitrary, unlawful and a serious interference with the plaintiff and relator in carrying out the reconstruction problems resulting from the late war with Germany, Austria and Bulgaria, and is seriously interfering with the President of the United States of America whose representative relator is, in carrying out the obligations and duties which he owes to claimants of and citizens of foreign governments with [4] which the United States of America has treaty obligations to perform; that a sufficient reserve has been set apart in said "Accident Fund" with said defendant by order of the Director of the Department of Labor and Industries or the former Industrial Insurance Commissioners of the State of Washington, and at all times maintained for the express purpose of paying each and all of the said claims for which said warrants were issued.

IX.

That the plaintiff and relator as an executive officer of the United States of America has been interfered with, put to expense, and seriously damaged by the said refusal of the said defendant and respondent to pay said warrants.

X.

That Harry G. Rowland is the duly appointed, qualified and acting representative of the plaintiff and relator, and that the plaintiff and relator has no plain, speedy or adequate remedy in the ordinary course of law.

WHEREFORE plaintiff prays that an order of this court shall be entered, directed to said respondent requiring that he answer this petition; that an alternative writ of mandate shall issue directed to said defendant under the hand and seal of this court requiring that he shall either pay the said warrants upon the "Accident Fund" of the State of Washington forthwith or that he shall show cause before this Court at a time and place to be designated by the Court why he has not done so; that upon the return of said alternative writ, a peremptory writ shall issue to the defendant directing him to pay the said warrants; that plaintiff shall recover of and from the defendant his costs herein sustained.

THOMAS W. MILLER,

Alien Property Custodian of the United States of America.

By HARRY G. ROWLAND,

His Representative.

H. G. & DIX H. ROWLAND,

Attorneys for Plaintiff. [5]

State of Washington,
County of Pierce,—ss.

Harry G. Rowland, being first duly sworn, on oath deposes and says: that he is the duly appointed, qualified and acting representative of Thomas W. Miller, Alien Property Custodian of the United States of America, the plaintiff and relator in the above-entitled action; that he has read the foregoing affidavit and complaint, knows its contents, and that the same is true;

That affiant makes this affidavit for and on behalf of the plaintiff and relator above-named.

HARRY G. ROWLAND,

Subscribed and sworn to before me this 1st day of June, 1923.

[Seal]

CHAS. W. STEWART,

Notary Public in and for the State of Washington,
Residing at Tacoma. [6]

[Title of Court and Cause.]

No. 4115.

Order for Alternative Writ of Mandamus.

This cause coming on to be heard this 8th day of June, 1923, upon the application of the plaintiff and relator above named for an order of Court directing that there shall issue an alternative writ of mandamus in accord with the prayer of the petition and affidavit on file in the above-entitled action, and it appearing to the Court that Thomas

W. Miller, Alien Property Custodian of the United States of America, plaintiff and relator above named, is the owner and holder of certain lawful warrants against the "Accident Fund" of the State of Washington drawn by the State Auditor of the State of Washington against said fund, a complete list of which is attached to the petition and affidavit in the above-entitled case marked Schedule "A" and Schedule "B" and made a part thereof, which said schedules show the number of said warrants, the dates thereof, the names of the payees and the amounts;

It further appearing to the Court that all warrants described in said Schedules "A" and "B" were demanded by this plaintiff of the Department of Labor and Industries in the year 1917 or 1918, but were unlawfully withheld from him by the said Department of Labor and Industries until after the decision of this Court and [32] the Circuit Court of Appeals; that the said warrants and claims are due to former alien enemies of the United States or allies of alien enemies of the United States, and that the plaintiff and relator is entitled to the fund represented by said warrants under the "Trading with the Enemy Act," so called, and was awarded them by this Court and the Circuit Court of Appeals;

It further appearing to the Court that on the 26th day of May, 1923, the plaintiff and relator duly presented said warrants to the defendant and respondent, offering to surrender the same upon payment thereof; that the said defendant and respondent refused to pay the same or any of them;

It further appearing to the Court by the said affidavit that the act of said defendant is arbitrary, unlawful and interferes with the plaintiff and relator as Alien Property Custodian of the United States; that the plaintiff and relator has no plain, speedy or adequate remedy in the ordinary course of law;

IT IS THEREFORE ORDERED that the defendant shall be served with a copy of the original affidavit and petition in the above-entitled case and shall answer the same.

IT IS FURTHER ORDERED that an alternative writ of mandamus shall issue under the hand and seal of the above-entitled Court directed to the said C. L. Babcock as said Treasurer of the State of Washington, requiring that he shall pay the said warrants upon the "Accident Fund" of the State of Washington forthwith, or that he shall show cause before this Court on the 25th day of June, 1923, at the courtroom thereof, in the courthouse of the United States District Court in the City of Tacoma, in Pierce County, Washington, why he has not done so; that a copy of such writ shall be served upon the defendant and respondent at least ten (10) days before the return day of said alternative writ, together with a copy of the original affidavit and complaint in this action. [33]

IT IS FURTHER ORDERED that service of the affidavit and complaint and of said alternative writ may be made either by the United States Marshal for this District, or the Sheriff of Thurston County, Washington, in like manner as a summons in a civil action is served.

Done in open Court this 8th day of June, 1923.

EDWARD E. CUSHMAN,

Judge of the District Court of the United States
for the Western District of Washington, South-
ern Division.

[Indorsed]: Filed in the United States District
Court, Western District of Washington, Southern
Division. Jun. 8, 1923. F. M. Harshberger, Clerk.
By Ed. M. Lakin, Deputy. [34]

[Title of Court and Cause.]

No. 4115.

Alternative Writ of Mandamus.

The United States of America to C. L. Babcock,
State Treasurer of the State of Washington, de-
fendant and respondent, GREETINGS:

WHEREAS it appears by the affidavit and veri-
fied petition of Harry G. Rowland, representative
of Thomas W. Miller, Alien Property Custodian
of the United States, the plaintiff and relator
above named and the party beneficially interested
herein, that the plaintiff and relator is the owner
and holder of certain lawful warrants against the
"Accident Fund" of the State of Washington, duly
drawn by the State Auditor of the State of Wash-
ington against said fund, a complete list of which
is attached to plaintiff's petition and affidavit in the
above-entitled case, marked Schedule "A" and
Schedule "B" and made a part thereof, which said
schedules show the number of the said warrants,

the dates thereof, the names of the payees and the amounts;

And it further appearing to the Court that all of the said warrants and the claims which they represent were demanded by this plaintiff from the Department of Labor and Industries in the year 1917 or 1918, but were unlawfully withheld from him by the said Department of Labor and Industries until after the decision of this Court and the Circuit Court of Appeals in an action brought [35] for the possession thereof; and the adjudication of said claims; that all of said warrants and claims are due to alien enemies of the United States or allies of alien enemies of the United States, and plaintiff and relator is entitled to the fund represented by said warrants under the "Trading with the Enemy Act," so called, and has been awarded them by this Court and the Circuit Court of Appeals;

And it further appearing to the Court that on the 26th of May, 1923, the plaintiff and relator duly presented said warrants to the said defendant and respondent for payment, offering to surrender the same upon payment thereof, and that the defendant and respondent refused to pay the same or any of them; that the said action of the said defendant in refusing to pay said warrants is arbitrary, unlawful and interferes with the plaintiff and relator, the Alien Property Custodian of the United States of America in the performance of his duties and the carrying out of the treaty obligations of the United States of America, and that the plaintiff

has no plain, speedy or adequate remedy in the ordinary course of law;

THEREFORE we do command you that you answer the petition and affidavit filed in behalf of the relator, a copy of which shall be served upon you together with this writ; that immediately upon the receipt of this writ, you pay all those certain warrants against the "Accident Fund" of the State of Washington, described in Schedules "A" and "B," to the plaintiff and relator, a list of which is attached to the petition and affidavit of the plaintiff for this writ, or that you show cause before this Court on the 25th day of June, 1923, at the opening of Court on said day, why you have not done so.

WITNESS the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, [36] Southern Division, and the seal of said Court this 8th day of June, 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Alice Huggins,

Deputy Clerk.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jun. 8, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [37]

[Title of Court and Cause.]

No. 4115.

Demurrer.

Comes now the defendant and respondent, by and through his attorneys, Honorable John H. Dunbar and M. H. Wight, attorney general and assistant attorney general, respectively, of the State of Washington, and demurs to the petition and affidavit of the plaintiff and relator herein upon the grounds and for the reasons that, as appears upon the face of said petition and affidavit:

I.

That the above-named Court has no jurisdiction of the defendant and respondent, or of the subject matter of this action.

II.

That the petition and affidavit of the plaintiff and relator on file herein does not state facts sufficient to constitute a cause of action.

WHEREFORE, defendant and respondent prays for the order of this Court sustaining this demurrer.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,

Assistant Attorney General,
Attorneys for Defendant and Respondent.
GUE & HALVERSTADT, of Counsel. [38]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern

Division. Jun. 25, 1923. F. M. Harshberger, Clerk.
By Ed. M. Lakin, Deputy. [38½]

[Title of Court and Cause.]

No. 4115.

Memorandum Decision on Demurrer.

Filed July 14, 1923.

H. G. & DIX H. ROWLAND, for Relator,
Hon. JOHN H. DUNBAR, Attorney General,
Hon. M. H. WIGHT, Ass't Attorney General,
GUIE & HALVERSTADT,

For Respondents.

CUSHMAN, D. J.—Relator cites and relies upon the following cases:

Commercial Trust Co., of New Jersey, vs.
Thomas W. Miller, Alien Property Custodian,
Adv. Op. U. S. Sup. Ct., No. 14, pp. 531 to
564; May 15, 1923; [39]

Charles Ahrenfeldt vs. Thomas W. Miller, Alien
Property Custodian, Adv. Op. U. S. Sup. Ct.,
No. 14, p. 546, May 15, 1923;

Kahn vs. Anderson, 255 U. S., 1; 65 Law Ed.,
469, 41 Sup. Ct. R. 224;

Vincenti vs. U. S. 272 Fed. 114, 256 U. S. 700,
65 L. Ed. 1178, 41 Sup. Ct. Rep. 538;

Kohn vs. Kohn, 264 Fed. 253;

Miller vs. U. S., 78 U. S. 268;

Miller vs. Camp, 280 Fed. 520;

In re Miller, 281 Fed. 773;

- Garvan vs. Marconi Wireless Tel. Co., 275 Fed. 486;
- Garvan vs. \$20,000 Bonds, 265 Fed. 477;
- Wenatchee Produce Company vs. Great Northern Railway, 271 Fed. 784;
- Central Union Trust Co. vs. Garvan, 254 U. S. 550;
- Stoehr vs. Wallace, 255 U. S. 239;
- Simon vs. Am. Exchange Bank, Decided December, 1922;
- Poindexter vs. Greenhow, 114 U. S. 270; 29 Law Ed. 191;
- Board of Liquidation et al. vs. Henry S. McComb, 92 U. S. 531, 35 L. E. 623;
- State vs. Toole, 26 Mont. 22; 66 Pac. 496; 91 Am. St. Reports, 386;
- Chaffin vs. Taylor, 116 U. S. 571; 29 Law Ed. 728;
- State ex rel. Gillette vs. C. W. Clausen, 44 Wash. 437;
- Abernathy vs. Medical Lake, 9 Wash. 112;
- Union Sav. B. & T. Co. vs. Gelbach, 8 Wash. 497;
- Cloud vs. Sumas, 9 Wash. 399;
- LaFrance Fire Engine Co. vs. Davis, 9 Wash. 600; [40]
- Mason vs. Purdy, 11 Wash. 591;
- Smith vs. Ormsby, 20 Wash. 396;
- State ex rel. Porter vs. Headlee, 18 Wash. 220;
- State ex rel. Dahlquist vs. Van Wick, 20 Wash. 391;
- American Bridge Company vs. Wheeler, 35 Wash. 40;

- State ex rel. Maddaugh vs. Ritter, 74 Wash. 649;
A. I. Beach vs. Andrew Olson et al., 91 Wash. 56;
Savage vs. Sternberg, 67 Am. St. Rpts. 751;
Brownell vs. Town of Greenwich, 22 N. E., 24-27, 114 N. Y. 518, 4 L. R. A. 684;
State vs. Pierce, 52 Kan. 521; 35 Pac. 19-22;
Corning vs. Meade County Commissioners, 102 Fed. 57;
State vs. Akers, 92 Kan. 169; 140 Pac. 637;
Jerome vs. Rio Grande County Commissioners, 18 Fed. 873;
Bank of Calif. vs. Shaber, 55 Cal. 322.
State vs. Gandy, 12 Neb. 232;
Busch vs. Geisy, 16 Ore. 355;
Day vs. Callow, 39 Cal. 593;
Lankford vs. Platte Iron Works, 235 U. S. 461;
Rolston vs. Missouri Fund Commissioners, 120 U. S. 390;
Ruling Case Law, Sec. 148, Vol. 18;
Ray vs. Wilson, 29 Florida, 342, 42 L. R. A. 775;
Masses Publishing Co vs. Patten, 246 Fed. 24;
U. S. vs. Casey, 247 Fed. 362; [41]
Story vs. Perkins, 243 Fed. 997;
McCormick vs. Humphrey, 27 Ind. 144;
Merchants, etc. Bank vs. Union Bank, 25 La. 387;
U. S. vs. Casey, 247 Fed. 362;
Tarble's Case, 13 Wall, 397, 20 U. S.;

- Same, 80 U. S. 397-413;
Miller, Executor *vs.* U. S., 78 U. S. 268-331;
Jefferson Publishing Co. *vs.* West, 245 Fed.
585;
U. S. *vs.* Pierce, 245 Fed. 878;
U. S. *vs.* Sugar, 243 Fed. 423;
Storey *vs.* Perkins, 243 Fed. 997;
U. S. *vs.* Sugarman, 245 Fed. 604;
U. S. *vs.* Stephens, 245 Fed. 956;
Angelus *vs.* Sullivan, 246 Fed. 54;
State *vs.* Hohm (Minn.) 166 N. W. 181;
Cohens *vs.* Virginia, 6 Wheat. 264;
Railroad Company *vs.* Miss., 102 U. S. 135;
Ames *vs.* Kansas, 111 U. S. 449;
Virginia Coupon Cases, 114 U. S. 270;
Smith *vs.* Kansas City Title & Trust Co., 255
U. S. 199, 65 Law Ed. 585;
Texas *vs.* Lewis, 14 Fed. 65;
U. S. *vs.* Louisiana, 123 U. S. 33, 127 U. S. 67;
Jones *vs.* Reed, 3 Wash, 60;
Johnson *vs.* Lankford, 245 U. S. 544;
Hopkins *vs.* Clemson Agricultural College, 221
U. S. 635;
Davenport *vs.* U. S., 19 Law Ed. 704;
Holt Co. *vs.* National Life Ins. Co., 25 C. C. A.
475;
Graham *vs.* Folsom, 200 U. S. 248; [42]
Gunter *vs.* Atl. Coast Line R. Co., 200 U. S.,
273, 4; 50 Law Ed., 478;
Morrill *vs.* Am. Reserve Bond Co., 151 Fed.,
305;
Nashville *vs.* Cooper, 6 Wall., 247; (73 U. S.)
18 Law Ed., 851;

Respondents cite and rely upon:

Board of Liquidation vs. McComb, 92 U. S., 531 at 541;

Antoni vs. Greenhow, 107 U. S., 769, at 783;

In re Ayers, 123 U. S., 443;

Pennoyer vs. McConnaughy, 140 U. S., 1, at 9; 10; 11 and 12;

Fitts vs. McGhee, 172 U. S., 516 at 524; 525; 528 and 529;

Lankford vs. Platte Iron Works, 235 U. S., 461;

Louisiana vs. Jumel, 107 U. S., 711 at 718; 720; 721 and 722;

Smith vs. Reeves, 178 U. S., 436 at 438;

Johnson vs. Lankford, 245 U. S., 541 at 545;

Edward Clifford, Superintendent, etc., vs. Thomas W. Miller, 288 Fed. 537;

Miller, Alien Property Custodian, vs. Rouse, 276 Fed. 715 at 716;

In these two cases, the Alien Property Custodian sues. In the one case, the Court is asked to direct the treasurer of the State of Washington to pay the relator the amount due on certain warrants in his possession, drawn upon the accident fund, which fund is held by the State Treasurer under the Workmen's Compensation Act of the State. The warrants and claims represented are alleged to be due former alien enemies or the allies of alien enemies of the United States. In the other case, the Court is asked to direct the State Auditor to audit a certain voucher upon such fund covering like claims, issued relator by [43] the Depart-

ment of Labor and Industries of the State of Washington and to issue relator a warrant upon the State Treasurer for payment thereof.

Respondents demur generally and upon the ground that the Court has no jurisdiction.

While these cases grow out of matters involved in *Edward Clifford, Superintendent, etc., vs. Miller, Custodian* (288 Fed., 537), they are not ancillary to that cause.

Section 24 of the Workmen's Compensation Act (Sec. 7703 Remington's Comp. Stats. 1922) in part provides:

"The director of labor and industries shall, in accordance with the provisions of this act:

"(2) Ascertain and establish the amounts to be paid into and out of the accident fund.

"(3) Regulate the proof of accident and extent thereof, the proof of death and the proof of relationship and the extent of dependency.

"(5) Issue proper receipts for moneys received, and certificates for benefits accrued and accruing."

Section 26 of the Act (Sec. 7705 Rem. Comp. Stats.) provides:

"Disbursements out of the funds shall be made only upon warrants drawn by the State Auditor upon vouchers therefor transmitted to him by the Department and audited by him. The State Treasurer shall pay every warrant out of the fund upon which it is drawn.

* * * "

The statute defining generally the duties of the State Auditor provides, among others:

“It shall be the duty of the Auditor,

1. To audit, adjust and settle all claims against the State, payable out of the treasury, except only such claims as may be expressly required by law to be audited and settled by other officers or persons. * * *

16. In his discretion, to require any person presenting an account for settlement to be sworn before him, and to answer, orally or in writing, as to any facts relating to it.

* * * ” (Sec. 9007 Rem. & Bal. Code).

By Section 9013 Rem. & Bal. Code, it is provided:
[44]

“All persons having claims against the State shall exhibit the same, with the evidence in support thereof, to the Auditor to be audited, settled, and allowed within two years after such claim shall have accrued, and not afterwards.”

While Section 9019 (Rem. & Bal. Code) provides:

“The Auditor, whenever he may think it necessary in the settlement of any account or the drawing of any warrant, may examine the party, witnesses and others on oath or affirmation touching any matter material to be known in the settlement of the account or the drawing of the warrant, and for that purpose he may issue summons and compel witnesses to attend before him and give testimony in the same manner and by the same means allowed

in courts of record, and he shall reduce such evidence to writing and file the same in his office.”

On the part of the relator it is contended that under Section 7705, Remington's Compiled Stats., *supra*, the duties of the Auditor concerning the issuing of a warrant are purely ministerial; that all discretion in the matter is exhausted when the Director as, under Section 7703, Remington's Comp. Stats., ascertained and established the amounts to be paid and issued a certificate for benefits accrued.

The Court is constrained to give effect to each word of the statute, unless to do so would clearly tend to defeat or impair the legislative intent. The Court cannot say, in view of the language of Section 7705, but that it was intended the Auditor should exercise a supervisory power and discretion concerning the acts of the Director, or it may have been intended that he, in his discretion, should consider matters supplemental to the Auditor's determination, as in case of death of a beneficiary after certificate or voucher issued. In either event, he is vested with a discretion in the matter.

It has been contended that these cases arising under the Constitution and Laws of the United States, the jurisdiction of this Court is original and that of the Supreme Court appellate. If that were all that was to be taken into account, the position [45] would be unassailable, but the controlling questions are whether, the Court being asked to con-

trol the discretion of these State officers, the suits are not, in effect, suits against the State, and whether, the Court being asked to control the discretion of these State officers, the suits are not, in effect, suits against the State, and whether the provisions of the Trading with the Enemy Act show an intention to confer on this Court power so to do.

The State Auditor and State Treasurer are, by the State Constitution, made executive officers of the State of Washington. (Art. 3, Sec. 1). The acts, the performance of which the Court is asked to compel them to do, are not at all in their own, individual interest, but solely for the State. The suits are, therefore, to be considered as against the State.

Lankford vs. Platte Iron Works, 235 U. S. 461;

Louisiana vs. Jumel, 107 U. S. 711;

Smith vs. Reeves, 178 U. S. 436.

While the question is one of jurisdiction of the Court, the following considerations are not deemed out of place:

Under the State Constitution and Law, it may be that the proper State court, by mandamus, could decree payment of the warrants by the Auditor. (State ex rel. Gillette vs. Claussen, 44 Wash., 437); but the question before this Court is not solved by that concession.

Relator in the suit against the Auditor relies upon the case of State ex rel. Gillette vs. Claussen, *supra*; but in that case it is said:

“Under the old practice in mandamus the question whether an auditing officer against

whom a writ of mandamus was sought acted in a purely ministerial capacity, or whether he exercised judgment and discretion in the settlement and adjustment of claims presented to him, was one of controlling importance, as the writ would lie in the former case but not in the latter. Under the practice in this State, however, the question whether the officer acts in a purely ministerial capacity or whether he exercises judgment and discretion, seems [46] to be one of little moment, except in so far as it may serve as a guide for the officer himself in the discharge of his official duties.

“This Court has repeatedly held that a mandamus proceeding under our statute possesses all of the elements of a civil action, and that it is no defense to the writ to show that the officer to whom the writ is directed exercised judgment and discretion and acted in good faith in the disallowance of the claim upon which the application for the writ is based. If any part of the relief to which the petitioner is entitled is by writ of mandamus the Court will try out all incidental questions in the mandamus proceeding.” (at pp. 442 & 3.)

The authority of the District Court of the United States, at least where the jurisdiction rests, not upon diversity of citizenship, but, in a case such as the present one, upon the fact that the controversy arises under the Constitution and Laws of the United States, does not extend as far as that of the

State Court under its law as construed in the foregoing opinion. By Section 262 of the Judicial Code (Sec. 1239, Comp. Stats.) the Court is authorized to

“issue all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.”

In mandamus proceedings the Conformity Statute does not apply,—at least as to the scope of the remedy.

Rosenbaum vs. Bauer, 120 U. S. 450;

Board of Liquidation vs. U. S., 108 Fed. 689; 47 C. C. A. 587;

Gares vs. N. W. Nat. Bldg., L. I. Ass’n., 55 Fed. 209.

Under its general jurisdiction, this Court may not, by mandamus, control such State officer in the exercise of his discretion; nor take money from the Treasury of the State.

Clifford vs. Miller, 288 Fed. 537.

The remaining question is not whether the Custodian has the [47] right to the possession of the money seized, but withheld by the Treasurer in the one case, or whether he has the right to the warrants which the Auditor refuses to issue in the other. The question now for determination is whether, by the trading with the Enemy Act, this Court has been given special jurisdiction and authority to determine what right and decree delivery to the Custodian of the money and the issuance and delivery to him of the warrants.

By Section 6 of the Trading with the Enemy Act (Sec. 3115 $\frac{1}{2}$ cc Comp. Stats.) it is provided:

“The President is authorized to appoint, prescribe the duties of, and fix the salary (not to exceed \$500 per annum) of an official to be known as the Alien Property Custodian, who shall be empowered to receive all money and property in the United States due to or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said Custodian under the provisions of this Act; and to hold, administer and account for the same under the general direction of the President and as provided in this Act.”

Section 7 (Section 3115 $\frac{1}{2}$ d Comp. Stats.), in part, provides:

“(c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be

seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

“The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him, shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

[48]

“(e) *No person* shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act.”

Section 3115½i provides:

“The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act,

with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled, 'An Act to codify, revise, and amend the laws relating to the Judiciary.' "

Section 3115 $\frac{1}{2}$ aa provides:

"The word 'PERSON,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or BODY POLITIC." (Italics those of the Court.)

Unless the words "body politic" occurring in the last quoted section were meant to include a State of the Union, as well as a municipality, there would, without question, be no authority for these proceedings. It has been held that the words "body politic" used in certain statutes include a State. (Ervin vs. State, 48 N. E., 249 at 251; 115 Ind., 332.) In holding that the United States could make a contract not previously directed by statute, Marshall, as Circuit Justice, held (Fed. Case No. 15, 747):

"The United States is a government and consequently a body politic and corporate capable of obtaining the objects for which it was created by the means which are necessary for the attainment."

It is well understood that this is a possessory suit, a seizure or capture on land, and that, as provided

in the Act, the rights of all interested are to be determined after the surrender of possession.

Under its war powers, Congress doubtless could confer upon a District Court authority to coerce a sovereign State and its officers, but that it so intended is not likely to be concluded [49] in the absence of positive and express congressional enactment,—particularly so in view of the provisions of Section 233 of the Judicial Code (Section 1210 Comp. Stats.), which provides:

“The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens, or between a State and citizens of other States, or aliens, in which latter cases it shall have original, but not exclusive jurisdiction.”

This statute is controlling of this question, despite the fact that the present suit may not be purely a controversy of a civil nature. The dignified treatment and consideration due a sovereign State form no small part of the reason that has actuated the law making powers in making a State subject alone to the jurisdiction of the Supreme Court. An implied repeal of the law conferring, so far as the courts of the United States are concerned, exclusive jurisdiction on the Supreme Court of suits against a State is not to be sanctioned, in view of the long established recognition of this principle in the history of the doctrine of State's rights.

The demurrers are sustained for want of jurisdiction.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 14, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [50]

[Title of Court and Cause.]

No. 4115.

Judgment of Dismissal.

This cause coming on for hearing on the 25th day of June, 1923, upon the return of the alternative writ of mandamus issued herein, the plaintiff and relator appearing by Wallace W. Mount, Assistant United States District Attorney, and by H. G. Rowland, attorney for and representative of the relator, and Dix H. Rowland of counsel and the defendant and relator appearing by John H. Dunbar, Attorney General for the State of Washington and M. H. Wight, Assistant Attorney General for the State of Washington and Guie and Halverstadt counsel and the said defendants and relators having been duly and regularly served with the affidavit and petition in said action the alternative writ of mandamus as by order of court provided and having appeared and filed a special appearance and also a demurrer to the affidavit and petition of the plaintiff and relator alleging as one of the grounds of the said demurrer that it appeared upon the face of the said petition and affidavit that the above-named court has no jurisdiction of the defendant and respondent or of the subject matter of the action and

also that the petition and affidavit did not state facts sufficient to constitute a cause of action and the court having heard the arguments of counsel for the relator and respondent and having taken the matter under advisement and having heretofore entered a memorandum decision sustaining the [51] said demurrer of the defendant and respondent for the reason that it appeared on the face of the affidavit and petition of plaintiff and relator that this court has no jurisdiction to hear and determine said cause and the plaintiff and relator having elected to stand upon his said affidavit and petition for a writ of mandamus and not to plead further

IT IS THEREFORE ORDERED that the said demurrer be and the same is sustained for want of jurisdiction and the said action be and the same is hereby dismissed for want of jurisdiction in the court to hear and determine the same to all of which the plaintiff and relator excepts and his exception is duly allowed.

Dated this 17th day of July, 1923.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 17, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [52]

[Title of Court and Cause.]

No. 4115.

Petition for Writ of Error.

To the Honorable Edward E. Cushman, Judge of the District Court aforesaid.

Now comes the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America by Wallace W. Mount, Assistant United States District Attorney, attorney for the relator and Harry G. Rowland, attorney for and representative of the relator, and respectfully shows that on the 17th day of July, 1923, the Court entered final judgment of dismissal herein for lack of jurisdiction against petitioner and in favor of C. L. Babcock, State Treasurer of the State of Washington.

Your petitioner feeling himself aggrieved by said judgment entered therein as aforesaid herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid sitting at San Francisco, California, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that all further proceedings [53] may

be suspended until the determination of the said writ of error by the Circuit Court of Appeals of the United States.

W. W. MOUNT,
Assistant United States District Attorney and
HARRY G. ROWLAND,
Attorneys for Petitioners in Error.

Service of true copy of petition for writ of error acknowledged this 17th day of August, 1923.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General,
GUIE & HALVERSTADT,
Attorneys for the Defendant and Respondent.

[Indorsed]: Filed in the United States District Court, Western District of Washington. Aug. 18, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [54]

[Title of Court and Cause.]

No. 4115.

Assignments of Error.

To the Hon. Edward E. Cushman, Judge of the District Court aforesaid.

Now comes the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, plaintiff and relator by Wallace W. Mount, Assistant United

States District Attorney, attorney for relator, and Harry G. Rowland, attorney for and representative of the relator, in the above numbered and entitled cause and in connection with its petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the hearing thereof, and upon which it relies to reverse the judgment entered herein, as appears of record:

FIRST.

That the United States District Court for the Western District of Washington, Southern Division erred in holding that the District Court did not have jurisdiction of the defendant and respondent and of the subject-matter of the action and for that reason erred in sustaining the demurrer of the defendant and respondent to the petition and affidavit of plaintiff and relator filed in this cause.

SECOND.

That the said District Court erred in entering a judgment [55] of dismissal in favor of defendant and respondent and against plaintiff and relator for lack of jurisdiction.

THIRD.

The said District Court erred in not granting plaintiff and relator a peremptory writ of mandamus against the defendant and respondent upon the return of the alternative writ issued herein.

WHEREFORE, plaintiff in error prays that judgment of said Court be reversed and that the said District Court be instructed to proceed with the hearing of said action and issue a peremptory writ

of mandamus directed to the defendant and respondent as prayed for in plaintiff's affidavit and petition.

W. W. MOUNT,
Assistant United States District Attorney and
HARRY G. ROWLAND,
Attorneys for Plaintiff and Relator in Error.
Filed this — day of August, 1923.

Clerk.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 18, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [56]

In the District Court of the United States for the
Western District of Washington, Southern Division.

No. 4115.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendant and Respondent.

Order Granting Writ of Error.

Now on this 20th day of August, 1923, it is ordered that a Writ of Error be granted the Plaintiff and Relator in the above-entitled action in accord with the prayer of his petition filed herein.

FRANK S. DIETRICH,
District Judge of the United States for the Western
District of Washington, Southern Division.

Copy of order granting writ of error acknowledged this 20th day of August, 1923.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General,
Attorneys for Defendant and Respondent.
GUIE & HALVERSTADT,
Counsel for Defendant and Respondent.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [57]

In the District Court of the United States for the
Western District of Washington, Southern Division.

No. 4115—LODGED.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendant and Respondent.

Writ of Error.

United States of America,
Western District of Washington,—ss.

The President of the United States of America to
the Honorable E. E. Cushman, Judge of the
United States District Court for the Western
District of Washington, Southern Division,
GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before you, between the
United States of America on the relation of Thomas
W. Miller, Alien Property Custodian of the United
States of America, plaintiff and relator in error,
and C. L. Babcock, State Treasurer of the State
of Washington, defendant and respondent in error,

a manifest error has happened to the damage of the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so [58] that you have the same at San Francisco, in the State of California, where said Court is sitting, within thirty days of the date hereof, in the said Circuit Court of Appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 20th day of August, A. D., 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,

Deputy.

Clerk of the United States District Court for the
Western District of Washington, Southern
Division.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [59]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. 4115—LODGED.

THE UNITED STATES OF AMERICA, on the Relation of THOMAS W. MILLER, Alien Property Custodian of the United States of America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of Washington,

Defendant and Respondent.

Citation to Defendant in Error.

The United States of America to C. L. Babcock, State Treasurer of the State of Washington,
GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein the United States on the relation

of Thomas W. Miller, Alien Property Custodian of the United States of America, is plaintiff and relator in error, and you are the defendant and respondent in error, to show cause, if any there be, why the judgment rendered against the said plaintiff and relator in error as in the Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK S. DIETRICH, Judge of the United States District Court at Tacoma, within said District, this 20th [60] day of August, in the year of our Lord, one thousand nine hundred and twenty-three.

FRANK S. DIETRICH,
Judge of the District Court of the United States
for the Western District of Washington, Southern Division.

Attest: F. M. HARSHBERGER,
Clerk.

By Ed. M. Lakin,
Deputy Clerk of the United States District Court
for the Western District of Washington, Southern Division.

Receipt of a copy and service of the foregoing citation this 20th day of August, 1923, is hereby admitted.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General.
GUIE & HALVERSTADT,
Attorneys for Defendant and Respondent.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [61]

[Title of Court and Cause.]

No. 4115.

Stipulation Re Printing Record.

It is hereby stipulated between the plaintiff and relator and the defendant and respondent, through their respective attorneys, that the following designated papers comprise all the papers, exhibits and proceedings which are necessary to the hearing of the cause upon Writ of Error to the United States Circuit Court of Appeals, for the Ninth Circuit:

1. Petition and affidavit for writ of mandamus.
2. Order for alternative writ of mandamus.
3. Alternative writ of mandamus.
4. Demurrer of defendant and respondent to affidavit and petition of plaintiff and relator.
5. Opinion of the District Court sustaining the defendant's and respondent's demurrer to plaintiff's affidavit and petition herein.
6. Decree and judgment of dismissal.
7. Petition for writ of error.
8. Plaintiff's and relator's assignment of errors.
9. Order granting writ of error.
10. Writ of error.
11. Citation to defendant in error.

12. Stipulation omitting titles and captions and omitting from the record copies of Exhibits "A" and "B." [62]
13. This praecipe.
14. Clerk's certificate.

It is further stipulated that in preparing the printed record, all captions and titles, except upon writ of error, citation to defendant in error and order allowing writ of error, may be omitted and that Plaintiff's Exhibits "A" and "B" attached to his petition and affidavit need not be printed in the record.

W. W. MOUNT,

Assistant United States District Attorney, and

HARRY G. ROWLAND,

Attorney for and Representative of Relator, Attorneys for Plaintiff and Relator.

JOHN H. DUNBAR,

Attorney General,

M. H. WIGHT,

Assistant Attorney General,

GUIE & HALVERSTADT,

Attorneys for Defendant and Respondent.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [63]

[Title of Court and Cause.]

No. 4115.

Praeceptum for Transcript of Record.

United States of America,

Western District of Washington,—ss.

To the Clerk of the above-entitled Court,

GREETING:

Please make, duly authenticate, and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, California, a transcript of the record on appeal in the above-entitled cause to include the following:

- | | |
|----------|--|
| First. | Petition and affidavit for writ of mandamus. |
| Second. | Order for alternative writ of mandamus. |
| Third. | Alternative writ of mandamus. |
| Fourth. | Demurrer of defendant and respondent to affidavit and petition of plaintiff and relator. |
| Fifth. | The opinion of the District Court sustaining defendant's and respondent's demurrer to plaintiff's petition and affidavit herein. |
| Sixth. | Decree and judgment of dismissal. |
| Seventh. | Petition for writ of error. |
| Eighth. | Plaintiff's and relator's assignments of error. |
| Ninth. | Order granting writ of error. |
| Tenth. | Writ of error. |

- Eleventh. . . Citation to defendant in error.
Twelfth. . . Stipulation omitting titles and captions and omitting from the record copies of Exhibits "A" and "B." [64]
Thirteenth. This praecipe.
Fourteenth. Clerk's certificate.

W. W. MOUNT,

Assistant United States District Attorney, and

HARRY G. ROWLAND,

Representative of Alien Property Custodian, Attorneys for Plaintiff and Relator.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy. [65]

United States of America,
Western District of Washington,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify and return that the foregoing is a true and correct copy of the record and proceedings in the case of the United States of America on the relation of Thomas W. Miller, Alien Property Custodian of the United States of America, Plaintiff and Relator, versus C. L. Babcock, State Treasurer of the State of Washing-

ton, Defendant and Respondent, Cause No. 4115, as required by the praecipe of counsel filed and shown herein, as the originals thereto appear on file and of record in my office in said district at Tacoma.

I further certify and return that I hereto attach and transmit the original writ of error and the original citation to defendant in error.

Attest my hand and the seal of said District Court, at Tacoma, in said District, this 22d day of August, A. D. 1923.

[Seal]

F. M. HARSHBERGER,
Clerk.

By Ed. M. Lakin,
Deputy Clerk. [66]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4115.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendant and Respondent.

Writ of Error.

United States of America,
Western District of Washington,—ss.

The President of the United States of America to
the Honorable E. E. Cushman, Judge of the
District Court of the United States for the
Western District of Washington, Southern
Division, GREETING:

Because in the records and proceedings, as also
in the rendition of the judgment of a plea which is
in the District Court before you, between the United
States of America on the relation of Thomas W.
Miller, Alien Property Custodian of the United
States of America, plaintiff and relator in error,
and C. L. Babcock, State Treasurer of the State of
Washington, defendant and respondent in error,
a manifest error has happened to the damage of the
United States of America, on the relation of Thomas
W. Miller, Alien Property Custodian of the United
States of America, plaintiff in error, as by said com-
plaint appears, and we being willing that error, if
any hath been, should be corrected, and full and
speedy justice be done to the parties aforesaid in
this behalf, do command you, if judgment therein
be given, that under your seal you send the records
and proceedings aforesaid, with all things con-
cerning the same, to the United States Circuit
Court of Appeals for the Ninth Circuit, together
with this writ, so that you have the same at
San Francisco, in the State of California, where
said Court is sitting, within thirty days of the date

hereof, in the said Circuit Court of Appeals, to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 20th day of August, 1923.

[Seal]

F. M. HARSHBERGER,

Clerk.

By Ed. M. Lakin,

Deputy.

Clerk of the United States District Court for the
Western District of Washington, Southern
Division.

Filed in the United States District Court, Western District of Washington, Southern Division. Aug. 20, 1923. F. M. Harshberger, Clerk. By Ed. M. Lakin, Deputy.

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 4115.

THE UNITED STATES OF AMERICA, on the
Relation of THOMAS W. MILLER, Alien
Property Custodian of the United States of
America,

Plaintiff and Relator,

vs.

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendant and Respondent.

Citation to Defendant in Error.

The United States of America to C. L. Babcock,
State Treasurer of the State of Washington,
GREETING:

You are hereby cited and admonished to be and
appear at a session of the United States Circuit
Court of Appeals for the Ninth Circuit to be holden
at the City of San Francisco, California, in said
Circuit, within thirty (30) days from the date
hereof, pursuant to a writ of error filed in the
Clerk's office of the District Court of the United
States for the Western District of Washington,
Southern Division, wherein The United States on
the relation of Thomas W. Miller, Alien Property
Custodian of the United States of America, is
plaintiff and relator in error, and you are the de-
fendant and respondent in error, to show cause, if

any there be, why the judgment rendered against the said plaintiff and relator in error as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. EDWARD E. CUSHMAN, Judge of the United States District Court at Tacoma, within said District, this 20th day of August, in the year of our Lord one thousand nine hundred and twenty-three.

FRANK S. DIETRICH,
Judge of the District Court of the United States
for the Western District of Washington, South-
ern Division.

Attest:

[Seal]

F. M. HARSHBERGER,
Clerk.

By Ed. M. Lakin,
Deputy Clerk of the United States District Court
for the Western District of Washington, South-
ern Division.

Receipt of a copy and service of the foregoing citation this 20th day of August, 1923, is hereby admitted.

JOHN H. DUNBAR,
Attorney General,
M. H. WIGHT,
Assistant Attorney General,
GUIE & HALVERSTADT,
Attorneys for the Defendant and Respondent.

Filed in the United States District Court, West-
ern District of Washington, Southern Division.

Aug. 20, 1923. F. M. Harshberger, Clerk. By
Ed M. Lakin, Deputy.

[Endorsed]: No. 4082. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America on the Relation of Thomas W. Miller, Alien Property Custodian of the United States of America, Plaintiff in Error, vs. C. L. Babcock, as State Treasurer of the State of Washington, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed August 23, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA ex rel. THOMAS
W. MILLER, Alien Property Custodian of the
United States of America,

Plaintiff and Relator in Error,

—VS.—

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendants and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR
IN ERROR

THOMAS P. REVELLE,
United States District Attorney,

W. W. MOUNT,
Assistant United States District Attorney,
Attorneys for Plaintiff and Relator in Error.

HARRY G. ROWLAND,
Representative of Alien Property Custodian,

DIX H. ROWLAND,
Counsel for Plaintiff and Relator in Error.

Address: 310 Federal Building, Seattle, Wash.

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA ex rel. THOMAS
W. MILLER, Alien Property Custodian of the
United States of America,

Plaintiff and Relator in Error,

—VS.—

C. L. BABCOCK, State Treasurer of the State of
Washington,

Defendants and Respondent in Error.

UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT OF THE WESTERN DISTRICT
OF WASHINGTON, SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR PLAINTIFF AND RELATOR
IN ERROR

STATEMENT OF THE CASE.

In the year 1922 Thomas W. Miller, Alien Property Custodian of the United States of America, brought a certain action in the United States District Court for the Western District of Washington, Southern Division, against the officers of the De-

partment of Labor and Industries of the State of Washington for the purpose of gaining possession of certain warrants on the "Accident Fund" of the State of Washington which had been drawn in the name of certain alien enemies of the United States but which had never been delivered to the payees at the time when the United States entered the World War; that said warrants were drawn to the said payees and the claims had been duly and regularly allowed against the "Accident Fund" of the State of Washington also known as the "Workmen's Compensation Fund" in favor of the said alien enemies; these claims were all reported to the Alien Property Custodian either by the officers of the Department of Labor and Industries of the State of Washington or by their predecessors in office and demand made by the Custodian for the payment of all such claims soon after the declaration of war by the United States as will appear by the record in the above entitled case (see *Clifford vs. Miller*, 288 Federal Reporter, page 537); that said report and demand was long prior to the signing of the treaty of peace; that at the time said demand was made all the said warrants were outstanding obligations against the Accident Fund of the State of Washington and no period of limitations had expired

against any of them (Petition and Affidavit, Paragraph V).

That the defendant and respondent is the State Treasurer of the State of Washington and as such it is his duty to pay warrants drawn on the said "Accident Fund" by the State Auditor of the State of Washington on vouchers furnished by the officers of said department or their predecessors; that said action resulted in a judgment in favor of the Custodian which said judgment was appealed to this court and the judgment of the District Court was affirmed (see *Clifford vs. Miller*, Federal Reporter 288, page 537); that upon the filing of the remittitur and the entry thereof in the District Court the said warrants were delivered to the plaintiff and relator herein, the same having been in the custody of the Clerk of the United States District Court at Tacoma; that there has been at all times a sufficient reserve set apart in the said Accident Fund with the said State Treasurer by order of the director of the Department of Labor and Industries or the former Industrial Insurance Commission of the State of Washington and at all times maintained **for the express purpose of paying each and all said claims for which warrants were issued** (paragraph 8 of the Petition and Affidavit).

That upon securing the possession of the said warrants the plaintiff and relator presented them to the defendant and respondent for payment offering to endorse the same and surrender them to him; that the said defendant refused to pay the said warrants or any of them (paragraph 5 of Petition and Affidavit).

That upon such refusal the plaintiff and relator brought this action in the U. S. District Court for the purpose of securing a Writ of Mandamus requiring the said defendant to pay the said warrants; that an Order for an Alternative Writ and an Alternative Writ of Mandamus were issued which in due time were made returnable; that upon the return day thereof the defendant appeared in said action and demurred to the petition and affidavit of the plaintiff and relator upon the grounds that the court did not have jurisdiction of the person of the defendant or of the subject matter of the action and that the Complaint did not state facts sufficient to constitute a cause of action (see Demurrer).

Upon the argument of the demurrer, the U. S. District Court entered a Memorandum Decision sustaining the same solely upon the ground that the

court did not have jurisdiction to hear and determine the case (see Opinion of Court).

The plaintiff and relator thereupon refused to plead further and a judgment of the District Court was entered dismissing the petition and the action for want of jurisdiction to which ruling the plaintiff excepted and his exception was allowed (Judgment of Dismissal); that upon entry of judgment the plaintiff and relator sued out this Writ of Error alleging as grounds therefore those stated in his assignments of error (Assignments of Error).

That the plaintiff and relator desires the payment of said warrants that he may collect the funds and distribute them to those who by acts of Congress shall be designed to be entitled thereto and that he may perform his duties as an executive officer representing the President of the United States so that the President may carry out the treaty obligations of the government with the foreign nations whose subjects are interested in the said funds.

The sole question involved in this case is whether or not the action is against the State of Washington, and if so, can it be brought in the District Court or must the plaintiff and relator apply for his relief to the Supreme Court of the United States.

SPECIFICATIONS OF ERROR.

I.

The United States District Court erred in holding that it did not have jurisdiction of the Defendant and Respondent and of the subject matter of the action and in sustaining the demurrer of the Defendant and Respondent to the petition and affidavit of the Plaintiff and Relator.

II.

The Court erred in entering judgment in favor of the Defendant and Respondent and against the Plaintiff and Relator for lack of jurisdiction.

III.

The Court erred in not granting plaintiff and relator a peremptory Writ of Mandamus against the Defendant and Respondent upon the return made to the Alternative Writ issued in said action.

ARGUMENT.

I.

THE PETITION AND AFFIDAVIT.

(a) The issuance of writs of mandamus follows the procedure prescribed for the State Courts by the State laws.

Rule 86, Page 72, Rules of Circuit Courts and District Courts.

(b) Issuance of the writ upon a sworn petition has been approved by the Supreme Court of Washington.

Smith v. Ormsby, 20 Wash. 396.

State ex rel. Cicoria v. Corgiat, 50 Wash. 95.

State ex rel. Adams v. Irwin, 74 Wash. 589.

State ex rel. Richardson v. Superior Court,
41 Wash. 439.

(c) That among the facts alleged in the affidavit and petition for the writ and admitted by the respondent's demurrer are:

1. That the relator is an executive officer acting under the President of the United States; that his position as Alien Property Custodian is by virtue of the "Trading with the Enemy Act," passed on the 6th day of October, 1917, and the acts of Congress amendatory and supplementary thereto, possessing all the powers granted by said acts and the executive orders in pursuant thereof. Paragraph I of Petition and Affidavit.

2. That the defendant and respondent is the State Treasurer of the State of Washington, and that it is a part of his duties to pay warrants which have been duly drawn by the Auditor of the State

of Washington upon the "Accident Fund" and issued to the holders thereof, upon vouchers presented to the Auditor by the officers of the Department of Labor and Industries or their predecessors in interest. Paragraph II of Petition and Affidavit.

3. That plaintiff and relator is the holder of certain warrants on the "Accident Fund" of the State of Washington possession of which was awarded him by a judgment entered by this Court in the case of *Clifford et al. v. Miller, Alien Property Custodian*, 288 Fed., page 537, as appears by Schedules A-B attached to petition. Paragraph IV of Petition.

4. That all of the claims represented by the warrants above referred to were demanded by relator of the Department of Labor and Industries in 1917 or 1918, but were unlawfully withheld from him until after the decision in the *Clifford* case; that relator did not receive the warrants till May 15, 1923; that all of said warrants were due former alien enemies or allies of alien enemies of the United States; *that relator is entitled to all of the said warrants and funds represented thereby under the Trading with the Enemy Act and was awarded them by the District Court and the Court of Appeals.* Paragraph V of Petition.

5. That the warrants were on the 26th day of May, 1923, duly presented by the relator to the respondent for payment and relator offered to surrender the same on payment of them; that respondent refused to pay the warrants or any of them. Paragraph V of Petition.

6. That the relator desires the payment of the warrants that he may carry out the acts of Congress and the treaty obligations of the government. Paragraph VII of Petition.

7. *That a sufficient reserve has been set apart in the accident fund with the respondent by order of the Director of Labor and Industries or the former Industrial Insurance Commissioners of the State of Washington and at all times maintained for the express purpose of paying each and all of the said claims for which said warrants were issued.* Paragraph VIII of Petition.

8. That the petition also contains the usual allegation that the respondent is an inhabitant of the judicial district in which the action is brought and that the relator has no plain, speedy, and adequate remedy in the ordinary course of law.

There could be no question about the sufficiency of this petition had it been filed in the Superior

Court of the State of Washington or the Supreme Court of the State of Washington. The question then arises can the action be maintained in the District Court of the United States.

II.

THE ACTION OF MANDAMUS IS RECOGNIZED BY BOTH STATE AND FEDERAL COURTS AS THE PROPER REMEDY TO COMPEL A MUNICIPAL OR STATE OFFICER TO PAY A WARRANT DULY ISSUED OR TO PERFORM ANY OTHER MINISTERIAL ACT.

Vol. 18, page 192, Par. 116, Ruling Case Law.

Vol. 18, page 225, Par. 149, Ruling Case Law.

J. A. Cloud v. The Town of Sumas, 9 Wash. 399.

The La France Fire Engine Co. v. E. D. Davis, Treasurer, 9 Wash. 600.

State ex rel. Dahlquist v. Van Wick, 20 Wash. 391.

State v. Akers, 92 Kan. 169, 140 Pac. 637; Am. Annotated Cases 1916-B, 543.

Bank of California v. Shaber, 35 Cal. 322.

State v. Gandy, 12 Neb. 232.

Busch v. Geisy, 16 Ore. 355.

Day v. Callow, 39 Cal. 393.

Jerome v. Rio Grande County Commissioners, 18 Fed. 873.

Robert v. U. S., 176 U. S. 221, 20 Supreme Court Reports 376; 44 Law Ed. 443.

Board of Liquidation et al. v. McComb, 92 U. S. 534, 541; 23 Law Ed. 623.

Virginia Coupon Cases, 114 U. S. 270, 293;
5 Sup. Ct. 903, 915; 29 Law Ed. 185.

Pennoyer v. McConnaughy, 140 U. S. 1, 10;
11 Sup. Ct. 699, 701; 35 Law Ed. 363.

Rolston v. Missouri Fund Com'rs., 120 U. S.
390, 411; 7 Sup. Ct. 599, 610; 30 Law
Ed. 721.

III.

THE TRADING WITH THE ENEMY ACT PROVIDES
THAT THE DISTRICT COURTS OF THE UNITED
STATES SHALL HAVE JURISDICTION IN ALL AC-
TIONS ARISING UNDER IT.

Section 3115½ of this act reads as follows:

“The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice or otherwise, and all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the act of March third, nineteen hundred and eleven, entitled ‘An Act to codify, revise and amend the laws relating to the Judiciary.’ ”

The questions then arise: what is the Trading with the Enemy Act? under what constitutional power, if any, was it passed? what is its purposes and object? was it intended that it should give to

the district courts of the United States original jurisdiction, or was its purpose to limit such jurisdiction to certain specific cases arising under it and leave other cases arising under it to other tribunals?

In order to understand the Trading with the Enemy Act let us then examine the Constitution of the United States and the Acts of Congress as they relate to the judiciary.

The Constitutional provision is as follows:

“The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, under their authority; to all cases affecting ambassadors, other public ministers and consuls * * * to controversies to which the United States shall be a party. * * * In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make.” (Art. III, Sec. 2, Const. of United States.)

The Judicial Code of 1789 distributed the jurisdiction of the United States Courts as follows: The District Courts were given original jurisdiction:

First, of all suits of a civil nature at common law or in equity brought by the United States or any officer thereof. * * *

Second, or where the matter in controversy exceeds exclusive of interest and cost the sum of \$3,000 and arises under the constitution or laws of the United States or treaties made or which shall be made under their authority * * *

Third, * * * of all seizures on land or water not within admiralty and maritime jurisdiction.

Fourth, of all suits against consuls and vice-consuls. (Hopkins' Judicial Code, Sec. 24, page 31.)

The Supreme Court of the United States was given exclusive jurisdiction of all controversies of a civil nature where a State is a party and in proceedings against ambassadors or public ministers and it was given original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers or in which a consul or a vice-consul is a party.

This action is brought by a United States officer and comes under Section I of the Judicial Code. It also arises under the constitution and laws of the United States and likewise comes under said section. It also has to do with seizures on land of

enemy property and comes under subdivision third of the Judicial Code.

All these sections give the District Courts jurisdiction of the present action. Congress also gave them jurisdiction under the provision of the Trading with the Enemy Act and for fear that someone might raise the question that the Trading with the Enemy Act did not include a State the act in Section II subdivision C defined the word person as follows:

“The word person as herein used shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or *body politic*.”

The definition of a body politic is defined by the text writers as follows:

Anderson's Law Dictionary, page 127, “the governmental, sovereign, power of a city or a *state*” (the italic being ours).

Black's Law Dictionary says, “it is a name applied to the state.”

The Supreme Courts of various states have defined it as “The state or nation as an organized political body of people collectively.” *People v. Snyder*, 279 Ill. 435-440, 117 N. E. 119.

Chief Justice Gray, quoting Chief Justice Marshall, defined it in the case of *Von Brocklin v. Anderson*, 117 U. S. 119, 29 L. Ed. 846, Justice Gray says:

“In the words of Chief Justice Marshall: ‘The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American People, and endowed by them with great powers for important purposes. Its powers are unquestionably limited; but while within those limits, the faculties and properties belonging to a government with a perfect right to use them freely, in order to accomplish the object of its institution.’ (*U. S. v. Maurice*, 2 Brock. 96, 109.)

And Webster’s New International Dictionary, 1921 Edition, defines body politic as “The state as a politically organized body of persons or as exercising political functions. ”

The executive orders attached to the Trading with the Enemy Act also likewise uses the word “body politic” in defining to whom they shall apply. The Judicial Code of 1789 as amended also defined the appellate jurisdiction of the Supreme Court of the United States and provided in Section 238 that the Court should have appellate jurisdic-

tion in any case that involves the construction or application of the Constitution of the United States and in any case in which the constitutionality of any law of the United States is drawn in question.

The present action is ancillary to the former action of *Clifford v. Miller*, 288 Fed. 537. It is simply to make effective this decision that the present action is maintained. Ancillary cases may be brought in the District Courts in aid of a decree of the Federal Court, and are not forbidden by the eleventh amendment to the Constitution, even though they may be against State officers. *Gunter v. Atlantic Coast Line Ry. Co.*, 200 U. S. 273-4, 50 L. Ed. 478 *et seq.*

IV.

THE TRADING WITH THE ENEMY ACT IS COMPLETE IN ITSELF; IT NEITHER EXPRESSLY AMENDS NOR REPEALS ANY OTHER STATUTE; IT WAS PASSED TO MEET THE EMERGENCIES OF WAR.

Whether taken as originally enacted, October 6, 1917, Chap. 106, 40 Stat. at L. 411, Comp. Stat. Par. 3115½ A, Fed., Stat. Anno. Sup. 1918, p. 847, or as since amended March 28, 1918, Chap. 28, 40 Stat. at L. 459, 460; November 4, 1918, Chap. 201, 40 Stat. at L. 1020; July 11, 1919, Chap. 6, 41, Stat. at L. 1020; July 17, 1920, Chap. 241, 41,

Stat. at L. 977, is strictly a war measure, and finds its sanction in the constitutional provision, Art. 18, cl. 111, "empowering Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Brown v. United States*, 8 Cranch, 110, 126, 3 Law Ed., 504, 510; *Miller v. United States (Page v. United States)*, 11 Wall. 268, 305, 30 L. Ed. 135, 144; *Stoehr v. Wallace* 255 U. S. 241, 65 Law Ed. 610. This last case says that an attempt of the Alien Property Custodian to recover property or funds comes under this section of the Constitution, and the passage of the Trading with the Enemy Act is simply making the necessary rules concerning captures on land. One of these rules is that the Alien Property Custodian must proceed in the District Court of the United States to enforce this law. Furthermore, the Judicial Code expressly gives the District Courts jurisdiction of all seizures on land and water not within admiralty and maritime jurisdiction. Judicial Code, Sec. 24, Par. third. The same Judicial Code that gives the District Court jurisdiction over seizures on land gives the Supreme Court jurisdiction in cases to which a State is a party. Judicial Code, Sec. 233.

It is clearly within the power of Congress to

thus distribute the jurisdiction, and it was clearly the intention of Congress not to give the Supreme Court original jurisdiction in that class of cases that involved seizures on land even though a State were a party.

Bearing upon this question, the Supreme Court of the United States, in the case of *Ames v. Kansas*, 111 U. S. 449, 28 L. Ed. 482, says: "*The judicial power of the United States exists under the Constitution, and Congress alone is authorized to distribute that power among the Courts.*"

It is consequently fitting and proper that Congress should, as it has done, provide that the District Courts shall have jurisdiction of actions arising under the Trading with the Enemy Act. Furthermore, the present action arises under the Constitution of the United States and the Laws of Congress, and in this class of cases the Supreme Court of the United States has appellate and not original jurisdiction.

This matter was decided at an early date by the United States Supreme Court in the case of *Cohens v. Virginia*, 6 Wheat. 264 U. S., in a now historic opinion written by Chief Gray quoting Chief Justice Marshall, who showed where the line should be drawn, viz: if a State be a party, the

jurisdiction is original; if it arises under the Constitution of the United States or an Act of Congress, it is appellate even though a State be a party. *Cohens v. Virginia*, 6 Wheat. 264; 5 Law Ed. 257; *Ames v. Kansas*, 111 U. S. 47; 28 Law Ed. 491.

In the case of *Ames v. Kansas*, *supra*, the Court states:

“Again, the grant of original jurisdiction to the Supreme Court is the same in the cases * * * in which a State shall be a party, as in the case of a consul.”

In the year 1884, one Preston sued one Börs in the Circuit Court of the United States for the Southern District of New York. Börs was the consul at New York for the Kingdom of Norway and Sweden. The suit was at law for \$7,313.10. The consul claimed his exemption and insisted that he must be sued in the U. S. Supreme Court, as the Constitution of the United States gave the Supreme Court jurisdiction in cases to which a State was a party, or in which a consul was a part. The Judiciary Act of 1789 had given the Circuit Court jurisdiction in this class of cases. The Supreme Court of the United States held that in this class of cases, the Circuit Court had original jurisdiction, and the Supreme Court appellate jurisdiction.

Börs v. Preston, 111 U. S. 256, 28 Law Ed. 420. This case was cited in the trial of the present action in the District Court, but for some reason the Court does not refer to this case in his opinion.

The fact that the Trading with the Enemy Act by the same section that gives the District Court jurisdiction, even though a body politic or State is involved, provides for appeals to the United States Circuit Court of Appeals and the United States Supreme Court, is proof positive that it was the intention of Congress to give the District Court original jurisdiction and the Supreme Court appellate jurisdiction in all cases arising under the Act.

The Supreme Court of the United States in the case of *United States v. Louisiana*, 123 U. S. 36, says that, "it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States." Surely, if this be the case, it is likewise competent for Congress to provide, as it has in the Trading with the Enemy Act, that suits against a State may be brought in the inferior courts of the United States.

In an early Federal case, the right of Congress to confer jurisdiction on the inferior Federal Courts in those cases in which, by the Constitution, the

Supreme Court has been given original jurisdiction, was held to be unquestioned. The case is that of *State of Texas v. Lewis et al.*, 14 Fed. 65. In this opinion the Court says:

“Cases affecting consuls stand in the same precise category as cases in which a State shall be a party (the italics are ours), and the opinion holds that the grant of original jurisdiction by Article 3, Sec. 2, of the Constitution, to the United States Supreme Court in all cases in which a State is a party, does not preclude Congress from conferring jurisdiction upon the Circuit Courts in cases brought by a State against an alien.”

The right of the Legislature to distribute the original jurisdiction of the Supreme Court granted by the Constitution was early considered and decided by the Supreme Court of the State of Washington in conformity with the decisions of the United States Supreme Court in *Ames v. Kansas*, 111 U. S. 449; *Börs v. Preston*, 111 U. S. 252; *United States v. Louisiana*, 123 U. S. 32. In this action the present Senator from the State of Washington, Hon. W. L. Jones, was respondent, and the opinion was written by Justice Dunbar, father of the present Attorney General of Washington. *Jones v. Reed, Auditor of Washington, and Lindsley, Treasurer of Washington*, 3 W. 57.

But the contention of the respondent which was urged in the lower Court and which will probably be insisted on here, is that while Congress undoubtedly has the right to take the jurisdiction away from the Supreme Court and vest it in the District Court where a State is a party, by the passage of the Trading with the Enemy Act it has not done so. This leads us to a consideration of the Trading with the Enemy Act as interpreted by the decisions of the Federal Courts:

1st. It is a war measure enacted by virtue of Art. 1, Sec. 8, Cl. 11, of the Constitution, empowering Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Central Union Trust Company v. Garvan*, 254 U. S. 533, 65 Law Ed. 403; *Stoehr v. Wallace*, 255 U. S. 241, 65 Law Ed. 610.

2nd. It is a summary measure and does not permit the merits or demerits of any seizure under it to be litigated in the Courts, but provides that, after the Custodian has made his demand, possession of the fund or property must be surrendered and a party claiming it must make good his claim against the Custodian by an action brought under Section 9, of the Act.

In the case of *Commercial Trust Company v. Thomas W. Miller* as Alien Property Custodian, decided April 23, 1923, reported in U. S. Supreme Court Advance Sheets of May 15, 1923, at page 542, it was held that "the Custodian succeeds to all the rights in the property to which the enemy is entitled as completely as if by conveyance, transfer or assignment;" that suits may be brought to gain possession of property or funds; that such suit is of as peremptory character as "seizure in pais, and is the dictate and provision for the emergency of war, not to be defeated or delayed by defenses, its only condition, therefore, being the determination by the Alien Property Custodian in that it was enemy property."

The decision further holds that the provisions of the Trading with the Enemy Act were passed by virtue of the legislative power of Congress; that the Act did not cease to be effective when the Treaty of Peace was signed, but is still in full force and effect. The Court in this connection says:

"A Court cannot estimate the effects of a great war and pronounce their termination at a particular moment of time, and its consequences are so far swallowed up that legislation addressed to its emergency had ceased to have purpose or operation with the cessation

of the conflicts in the field. Many problems would yet remain for consideration and solution, and such was the judgment of Congress, for it reserved from its legislation the Trading with the Enemy Act and amendments thereto, and provided that all property subject to that Act shall be retained by the United States until such time as the Imperial German Government * * * shall have * * * made suitable provisions for the satisfaction of all claims."

C. Trust Co. of New Jersey v. Miller, Custodian, supra; also *Kahn v. Anderson*, 255 U. S. 1, 65 Law Ed. 469; *Vincenti v. United States* (C. C. A.), 272 Fed. 114, and 256 U. S. 700, 65 Law Ed. 1178; *Ahrenfeldt v. Miller*, decided April 23, 1923, U. S. Supreme Court Advance Sheets, May 15, 1923, p. 546.

In a very recent decision in re. *Miller*, 281 Fed. 773, the Federal Court, referring to the duties of the District Courts to enforce the Act, says:

"It certainly needs no argument to show that if the Custodian was entitled to make the demand for the delivery of the property, he was equally entitled to resort to the District Court after his demand was not complied with, *for the Act, itself, expressly makes it the duty of the Court to enforce the provisions of the statute.* It certainly is true that Section 17 was not intended to be a *shield* to be used by the persons who are resisting compliance with the

Custodian's demand, but rather as a *sword* against those who ignore the peremptory character of the action. The Custodian is in Court now not asking a new seizure of property in his behalf, but to aid him in a seizure already made. Every feature of the Act has been considered and construed and upheld by the Supreme Court and the Federal Court, citing several recent cases."

The present case is not a new demand, but simply the enforcement and carrying out of the original demand made for this fund; it is simply to make effective the judgment in the *Clifford* case.

The Supreme Court of the United States has frequently held that ancillary cases may be brought in the District Court in aid of a decree of the Federal Court, and are not forbidden by the eleventh amendment, or the Constiution itself, even though they may be against State officers. *Gunter v. Atlantic Coast Line R. R. Co.*, 200 U. S. 273-4, 50 Law Ed. 478 *et seq.*

The proceeds of these warrants do not belong to the State of Washington, but title to the same became vested, for the purpose of distribution under Acts of Congress, in the Custodian early in 1918, when he made his demand therefor. *Kohn v. Kohn*, 264 Fed. 253; *Miller v. Camp*, 280 Fed.

525; *In re Miller*, 281 Fed. 764; *Garvan v. \$20,000 Bonds*, 265 Fed. 477.

The Act in question is a complete statute passed in the emergency of war to regulate dealings with the enemy. It is our contention that the war power of Congress is Supreme; that every other constitutional provision must give way to it; that the Trading with the Enemy Act gives the District Courts sole authority to make all orders, rules and regulations to make it effective. Had Congress so desired, it could have given this power to the military Courts, or provided a special tribunal, even though such action were against the State. When it designated the District Courts as the tribunal to enforce this law, and made it apply to persons, corporations, associations, individuals and body politics, it took in everything, and intentionally so, that all enemy-owned property, regardless in whose custody it might be, should be seized, held and collected to meet the expenses attending the war. It was peremptory and it was never the intention to require the Custodian to go to the United States Spureme Court in order to sustain a demand against a State. The Supreme Court of the United States is not primarily a Court of original jurisdiction. It has neither the time nor the facilities

for taking of evidence and examination of witnesses. It is inconceivable that it was the intention of Congress to compel the Custodian to proceed in the United States Supreme Court in an action where a State officer withheld from him property or money to which he was entitled. The Trading with the Enemy Act shows that it was the intention of Congress that all actions, those against State officers as well as others, should be brought in the District Courts. Otherwise, it would not have used a term like "body politic," which is confined almost solely to the State.

So paramount is the War Power of Congress that the United States Supreme Court has held that it can displace the police power of a State.

It was held in *Masses Publishing Company v. Pat-ten*, 246 Fed. 24, Annotated Cases 1918-B, 1009, that this power is the legislative power which Congress possesses as an incident to the expressly granted power to declare war; "The Constitution vests in Congress plenary war power; Congress can begin, carry on and terminate wars without any express limit as to time, means or manner." *Tod v. Fairfield Co. Ct.*, 15 Ohio St. Rep. 389.

It is said in *U. S. v. Casey*, 247 Fed. 362: "The war power resides in the Nation's right of self-pre-

servation—the preservation not only of itself, but of all of its citizens;” and in *Story v. Perkins*, 243 Fed. 997, it was said, after the enumeration of the powers of Congress, among them, as we have seen, “the power to raise and support armies, in Clause 18 of Articles 1 to 8, it provides the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all powers vested by this Constitution in the Government of the United States or in any department or officer thereof. Here is the great reservoir of power to save the National existence. The President of the United States is the Commander in Chief of the Armies and Navies, and when Congress declares war, by that declaration it puts in force the laws of war, and the war powers of the Government which are not to be exercised under the Constitution in times of peace, come into full force by virtue of the Constitution and are to be executed by the President and Congress.” *McCormick v. Humphrey*, 27 Ind. 144. In the same case, quoting from Chief Justice Marshall, the opinion says: “Congress must possess the choice of means and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the Constitution.”

How absurd it is, in the light of these decisions by our highest Courts, to say that Congress has not the power in a comprehensive war measure like the Act in question, to give the District Courts jurisdiction over this war measure, unless it expressly repeals by direct enactment that part of the Judicial Code which gives the Supreme Court exclusive jurisdiction in cases to which a State is a party.

It was said in *Merchants, etc., Bank v. Union Bank*, 25 La. 387: "In the exercise of war powers, the United States is not restrained by the limitations which the Constitution imposes on it as a sovereign."

It is said in *U. S. v. Casey*, 247 Fed. 362, that this Congressional power extends to the most minute regulation of conduct, and *Tarbel's Case*, 13 Wall. 397, 20 U. S. Law Ed. 597, holds that this war power is not subject to the police power of a State, and is not subject to interference by a State government.

The Trading with the Enemy Act was passed to enable the Government to peremptorily seize and sequester and manage and control all enemy-owned property during the period of the war and reconstruction, and does not, by its terms, repeal or amend any other act of Congress.

It deals with subjects which, but for the Constitutional right of Congress to wage war, would be unconstitutional and void.

It forbids trading with the enemy, which in time of peace, under existing peace laws, would be unconstitutional.

It provides for sequestration of all enemy properties for search and seizure and many other things which would not be considered except for the war emergency. It provides for many things upon which were statutes already existing, and yet it does not repeal or amend any of them. It provides what Courts shall have jurisdiction of cases arising under the Act.

It was undoubtedly the purpose of Congress to give the President absolute and plenary control of all enemy property that the war might be fought to a successful termination, and settlements made without interference with persons, associations, partnerships, corporations or body politics. In order to do this, it was necessary to provide some tribunal which had the necessary machinery at hand, and who might aid the President of the United States to enforce his demands in the event that they were not complied with.

It not only did provide such a tribunal in the District Court of the United States, but it also placed upon these Courts the burden of making all necessary orders, rules and regulations to carry into effect the Act.

It is no more a repeal of existing statutes to provide that a District Court shall have jurisdiction in cases where a body politic is involved, although prior to that time such jurisdiction might have been vested in the United States Supreme Court, than it is a repeal of the provisions of the statutes of the United States, which in time of peace secures everybody against search and seizure, and against the taking of his property without due process of law. The Act in question gives the President the right to summarily seize all alien property.

The war power of Congress is so paramount that every other Constitutional power must give way to it. *U. S. v. Tarble*, 80 U. S. 397-413; *Miller, Executor, v. United States*, 78 U. S. 268-331.

The Espionage Act in time of peace would have been held unconstitutional but as a war measure it was sustained. *Jefferson Publishing Co. v. West*, 245 Fed. 585; *U. S. v. Pierce*, 245 Fed. 878.

The Federal Courts have held that this war power has no limitations, and so held in sustaining the

selective draft law. *U. S. v. Sugar*, 243 Fed. 423.

The respondent's claim made in the lower Court that he should not pay these warrants because more than five years had elapsed since they were drawn, is not tenable and *cannot be sustained*. The opinion of the District Court does not discuss this, basing his decision entirely on the lack of jurisdiction because the action was brought in the District Court of the United States, instead of the Supreme Court of the United States; but, inasmuch as this matter was considered in the lower Court, we will refer to it here. The section of the Washington statute pertaining to this question is 11008 of Rem. Com. Stat. of Washington, 1922, reading as follows:

“All warrants drawn on the State Treasurer shall be presented for payment within the period of five years after the date of the issuance thereof, and should the payee of the warrant or warrants neglect to present the same for payment within the time specified, it shall be the duty of the State Auditor to enter the same as canceled on the books of his office, and to notify the State Treasurer of such cancellation.”

The section further provides that the Auditor may, under certain circumstances, issue duplicates. Were there anything in this contention, it would not be available to the respondent, because the statute of limitation, in order to be effective, must

be pleaded. If raised by demurrer, it must be by a special demurrer, and not by a general demurrer that the petition does not state facts sufficient to constitute a cause of action. Encyclopedia of Pleading and Practice, Vol. 13, page 200, Par. 4, and Vol. 13, Par. 4, Sec. 7. *National Bank v. Carpenter*, 196 U. S. 167. As a matter of fact, however, both State and Federal authorities hold that in the circumstances alleged in the petition in this case, the warrants in question were never issued. It has been repeatedly held that a warrant is not issued until it has been drawn and placed in the custody of some person who was authorized to collect it. The Supreme Court of Washington early decided this in the case of the *American Bridge Company v. Wheeler*, 35 Wash. 40, where the Auditor drew a warrant but did not deliver it to anyone authorized to receive it. The situation is the same here. The warrants were drawn and placed with the Department of Labor and Industries. They were demanded in 1918 by the Alien Property Custodian long before the five-year period elapsed as to any of them. They were not received by anyone authorized to collect them until May 15, 1923, when the relator received them as a result of the judgment in the case of *Clifford v. Miller*, 288 Fed. 537. To the same effect

is *Brownell v. The Town of Greenwich*, 22 N. E. 24-27; 114 New York 518; 4 L. R. A. 685; *State v. Pierce*, 52 Kas. 521. The same has been the uniform holding of the District Courts and Circuit Courts of the United States—the leading case being that of *Corning v. Meade County Commissioners*, 102 Fed. 57.

Furthermore, it is a well known principle of law that all Statutes of Limitations are suspended by war, and the *Treaty of Peace* was not signed until November 15, 1922. In the circumstances, the period of limitations would not begin to run against the warrants until May 15, 1923, when they were delivered to the relator representing the claims.

It is the duty of the Department of Labor and Industries to ascertain and establish the amounts to be put into and taken out of the Accident Fund. Sections 77 to 103 of Rem. Com. Stat. of Washington, Sec. 2.

It is the duty of the Treasurer to pay every warrant out of the fund upon which it is drawn, and disbursements can only be made upon warrants drawn by the State Auditor upon vouchers transmitted to him by the Department and audited by him. The warrants in question were all legally drawn upon proper vouchers upon claims duly al-

lowed, and there is money in the Treasury set apart expressly for the payment of these warrants, as stated in the petition and admitted by the demurrer.

V.

THE ELEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES HAS NO APPLICATION TO THE PRESENT CASE.

This amendment is as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." It requires no argument to show that a suit brought by the President of the United States to enforce an act of Congress is not covered by it. That the case is one brought by the United States cannot be questioned, even though it be brought by an executive officer. In other words, the eleventh amendment does not cover cases brought by the sovereign powers. *State of Louisiana v. James Rudolph Garfield*, 211 U. S. 70, 53 Law Ed. 92; *Oregon v. Hitchcock*, 202 U. S. 60, 50 Law Ed. 935; *Naganab v. Hitchcock*, 202 U. S. 473, 50 Law Ed. 1113; *Minnesota v. Hitchcock*, 185 U. S. 373.

VI.

THE AUTHORITIES CITED BY THE RESPONDENT IN
THE LOWER COURT AND REFERRED TO IN THE
OPINION OF THE DISTRICT COURT.

The principal case mentioned is *Lankford v. Platte Iron Works*, 235 U. S. 461, 59 Law Ed. 316, 35 Supreme Court Report 373. This was an action brought against State officials to secure certain funds held in the Treasury of Oklahoma under the Oklahoma Bank Guaranty Act. It was decided in a five-to-four opinion, the majority holding that this was an action against the State, although prosecuted against State officers.

This case might have some application were it not for the Trading with the Enemy Act.

The case did not involve the Constitution of the United States, nor an Act of Congress.

It did not involve a statute passed by Congress in furtherance of the war power granted the President and Congress by the Constitution of the United States.

It had nothing whatsoever to do with the Trading with the Enemy Act, but construed a statute of the State of Oklahoma. The Supreme Court of the United States has not seen fit to follow, to any

great extent, this decision, even in the cases where the Trading with the Enemy Act was not involved. The case is distinguished in *Johnson v. Lankford*, 245 U. S. 544, 62 Law Ed. 460.

The acts of the State officers of the State of Washington, in withholding possession of this fund from the Custodian is a violation of the criminal section of the Trading with the Enemy Act. Sec. 16 of the Trading with the Enemy Act provides that any person who shall wilfully violate, neglect or refuse to comply with any order of the President issued in compliance with the provisions of the act, shall be fined not more than Ten Thousand Dollars, or, if a natural person, shall be imprisoned.

The Supreme Court has drawn a distinction between acts of officers erroneously performed and those arising in tort. In a case much later than the Oklahoma case, *Truax v. Raich*, 239 U. S. 35, 60 Law Ed. 131, Justice Hughes, writing an opinion, states that such an action was not against a State, citing *ex parte Young*, 209 U. S. 123, 155, 161, 52 Law Ed. 714, 727, 729, and numerous other authorities.

Much was made in the lower court of a statement of Justice Rudkin, of this court, in the case of *Clifford v. Miller*, 288 Fed. 537, in which the

case of *Lankford v. Platte Iron Works* was referred to, it being assumed by the attorneys for the respondent that this remark indicated that the Circuit Court of Appeals would not sustain the right of the Custodian to mandamus the State Treasurer for the payment of the warrants, possession of which had been ordered delivered to him by the above decision. This statement was not necessary for a decision of the case, hence was dictum, and it is not our belief that this Court intended that such a construction should be placed upon it. The Court very well said, in the same opinion, that the Alien Property Custodian has succeeded to the rights and remedies of the alien enemies. It seems to us absurd to say that an alien enemy would not have a right to collect these warrants which had unlawfully been withheld from him by the Department, although his title to the warrants was unquestioned.

VII.

CONCLUSION.

The attitude of the State of Washington in this matter is incomprehensible. In the case of *Clifford v. Miller*, 288 Fed. 537, the plaintiff was awarded certain property, including the warrants in question.

It has never been contended by the respondent

or anyone connected with the State government of Washington, but that the Alien Property Custodian was entitled to the warrants and the funds represented thereby, and such contention could not be made in the line of all of the decisions of the United States Supreme Court. The officers of the State of Washington, instead of complying with the request of the Custodian and aiding him in securing the funds in question and in carrying out the treaty obligations of the Government and the difficult problems of reconstruction with which the President of the United States is burdened, have placed every obstacle in the way of the President of the United States.

In the Clausen case, that is set for hearing today, officers of the Department of Labor and Industries said that in the issuance of the vouchers to the Custodian they were *doing so involuntarily*, and were compelled to do so by this Court. What a position to take by State officers of the State of Washington! They say, "Yes, you are entitled to the funds, but you have not proceeded before the proper tribunal." They say that it is not within the power of Congress to delegate to District Courts the right of the President of the United States to proceed in cases in which a State officer is involved.

The State officers appeared in the Clifford case, and by their demurrer admitted that the Treasurer of the State of Washington stood ready and willing to pay the warrants in question. They appear in this action by the same Attorney General, and now claim that the Treasurer is unwilling to pay these warrants. The State officers in their attitude assume that the State is greater than the Nation, and the right of the officials is paramount to that of the President of the United States in a matter in which Congress, under its war power, has given the President extraordinary and plenary power.

We submit that the demurrer should be overruled; that the case should be reversed; that the respondent, having made no return except by filing a demurrer to the petition, should be required, by a peremptory writ, to pay to the Custodian the warrants in question.

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In the United States Circuit Court of Appeals For the Ninth Circuit

THE UNITED STATES OF AMERICA,
ex rel. THOMAS W. MILLER, Alien
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v.

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urer of the State of Washington,
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UPON WRIT OF ERROR TO THE UNITED STATES
DISTRICT COURT, WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION.

HONORABLE EDWARD E. CUSHMAN, *Judge Presiding.*

BRIEF FOR DEFENDANT AND RESPONDENT IN ERROR

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BRIEF FOR DEFENDANT AND RESPONDENT IN ERROR

STATEMENT OF THE CASE.

The facts in this case are not in dispute, as the real issue was raised by demurrer and we will not again state the facts which are outlined in plaintiff's brief.

ARGUMENT.

The controlling issue in this case is: Has the District Court jurisdiction of an action against the state by virtue of the Trading with the Enemy Act, which was originally enacted October 6, 1917, (ch. 106, 40 Stat. at L., 411) ?

This issue resolves itself into the question of whether or not section 17 of the Trading with the Enemy Act, 1918 Supp. Fed. Stat. Ann., page 865, repeals by implication section 233 of the Judicial Code.

I.

THIS IS AN ACTION AGAINST THE STATE.

We think it is practically conceded in plaintiff's brief that this is an action against the state, but in any event, we desire to call the court's attention to a few authorities on this question which we deem controlling.

In the case of *Clifford v. Miller*, 288 Fed. 537, an action was instituted by the Alien Property Custodian to reduce to possession certain warrants held by the Department of Labor and Industries, and in holding that such an action was not an action against the state, the court, in distinguishing the case of *Lankford v. Platte Iron Works*, 235 U. S. 461, said:

"No relief whatever is sought against the state and no attempt is made to control the discretion of its executive officers or to administer funds in the public treasury. In this respect the case differs

widely from *Lankford v. Platte Iron Works*, 235 U. S. 461, 35 Sup. Ct. 173, 59 Law Ed. 316, and kindred cases cited by the appellants. In the *Lankford* case the court awarded a money judgment to the plaintiff and decreed that it was entitled to have the same paid out of the depositors' guaranty fund created under and by virtue of the laws of the State of Oklahoma. Had the appellee here sought the same measure of relief, there would be some analogy between the two cases. But, as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers."

Inasmuch as this is an action to compel the State Treasurer to pay out of the State Treasury state funds, it is submitted that the case quoted, *supra*, holds squarely that the present action is an action against the state.

In the case of *Lankford v. Platte Iron Works*, 235 U. S. 461, 59 Law Ed. 316, it appears that an action was instituted by the appellee against the Oklahoma State Banking Board and J. D. Lankford, the State Bank Commissioner. It appears that the appellee was the holder of two certain time certificates of deposit issued by a certain bank. Subsequently, the Bank Commissioner took charge of the bank and all of its assets, and proceeded to wind up its affairs. Demand was made for the payment of the certificates upon the Banking Board, and the Commissioner, out of the depositors' guaranty fund of the state, but payment was refused. The banking law of the State of Oklahoma provided that if there should be not

sufficient funds available for the purpose of paying depositors of a defunct bank, that the Banking Board should be required to issue certain certificates of indebtedness for the amount of the deposit, to be known as depositors' guaranty fund warrants of the State of Oklahoma, and that the Banking Board should be required to levy an assessment against the capital stock of each and every stock company organized and existing under the laws of Oklahoma for the purpose of increasing such depositors' guaranty fund and pay the depositors and the depositors' guaranty fund warrants of the State of Oklahoma. It was contended on behalf of the appellant that this was a suit against the state and that the appellants had no personal interest therein and were being sued in their official capacity as agents of the state. On behalf of the appellee it was urged that this was not an action against the state because an action against a state officer to compel him to perform duties prescribed by law is not an action against the state, and that an officer who refused to obey the laws does not stand for the state within the meaning of the Federal Constitution. It was also asserted by the appellee that the depositors' guaranty fund was not under the executive and legislative control of the state and cannot be used by either for any purposes whatever, but can be used solely for the purposes of paying depositors of failed banks. The court then goes on to state that "where the state should vest the title to the fund for the purpose of its administration was

immaterial to the essence of the power to create the fund. Whether the state should commit it to the mere ministerial administration of the Bank Commissioner and Banking Board, and subject them to controversies with depositors, or draw around them the circle of its immunity, was a matter within its competency to determine, and we are brought to the question of interpretation — which has the state done?" The court then goes on to state that under the law the Banking Board is composed of the Bank Commissioner and three other persons, and that the board shall have supervision and control of the depositors' guaranty fund, and shall have power to adopt all necessary rules and regulations not inconsistent with law for the management and administration of the fund. The fund is created by levying against the capital stock of each and every bank organized and existing under the laws of the state, by an annual assessment, the fund to be used solely for the purpose of liquidating deposits of failed banks and retiring warrants provided for in the act, and if there be a deficiency, depositors' guaranty fund warrants may be issued, and an additional levy made against the member banks for the purpose of paying these certificates. In holding that it was an action against the state, the court said:

"There is strength in the contentions and we are not insensible to it, but there may be more complexity in fulfilling the scheme of the statute than the language of counsel exhibits, and it may be embarrassed

if not defeated by subjecting the Banking Board to incessant judicial inquiries of its administration. We certainly cannot assume that it will not do its duty and provide the ultimate payment of all depositors. To this result the state makes itself an active agent. It is given a lien upon the assets of insolvent banks and upon all liabilities against their stockholders, officers, directors, and against other persons, which may be enforced by the state for the benefit of the fund which its law has created."

The analogy between the accident fund here involved and the state guaranty fund involved in the *Lankford* case, *supra*, may readily be seen. The accident fund is composed of premiums levied by the state in the nature of a tax by virtue of its police power for a specific purpose, namely, paying injured workmen and their dependents for injuries, and in case of any deficiency in any particular class in the accident fund, an additional levy may be made by the state for the purpose of taking care of the deficiency, and it is submitted that the State of Washington has as much title to the accident fund here involved as the State of Oklahoma had to the state guaranty fund involved in the *Lankford* case.

In the case of *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, it was held that an action against the State Treasurer in his official capacity, is in substance an action against the state itself. The court observes at page 438:

"It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under

assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the comptroller, and the provision that the treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento,' indicates that the state contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value, for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it, and to proceed to final decree, nor could it, merely in obedience to the laws of the state, transfer it to a state court upon the demand of the State Treasurer. A Federal Court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States."

In the case of *Title Guaranty & Surety Co. v. Guernsey*, 205 Fed. 91, a case in the same district in which this action was filed, in a decision by Judge Cushman, it was held that a suit against state officers to enjoin them from paying over money of the state in their hands due to a contractor and enforce a lien thereon is a suit against the state and not within the jurisdiction of the Federal Court. In the case of *Carolina Glass Co. v. Murray*, it was held that a suit against the members of the State Dispensary Com-

mission of South Carolina for the recovery of money for supplies furnished was a suit against the state. See, also to the same effect, *Murray v. Wilson Distilling Co.*, 213 U. S. 151, 53 L. ed. 742.

It would seem to be the general rule that any suit against a state official which calls for the payment of state funds is held to be a suit against the state. This action, therefore, being an original action and calling for the payment of money by the State Treasurer from the public treasury, is a suit against the State of Washington, and therefore can only be instituted as an original proceeding in the Supreme Court of the United States.

II.

SECTION 17 OF THE TRADING WITH THE ENEMY ACT DOES NOT REPEAL SECTION 233 OF THE JUDICIAL CODE.

(a) The Trading with the Enemy Act does not apply to a state.

The Trading with the Enemy Act was enacted as a war measure for the purpose of restraining persons owing money to an alien enemy from turning such moneys over to an alien enemy, and thus give aid and comfort to a country and its inhabitants waging war against this country. In determining the intent of Congress in passing this act, it is submitted that Congress had no apprehension that one of the component states of this Union would give financial aid to alien enemies, and this is strengthened by the fact that in

defining the word "person," the term "state" is not used, but rather the vague term "body politic," which counsel for the plaintiff strenuously contends includes a state. The term "person," in section 2, subdivision (c) (Fed. Stat. Ann., 1918 Supp., p. 848) of the Trading with the Enemy Act, is defined as follows:

"The word 'person,' as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

Counsel devotes considerable space in his brief in an effort to show that the term "body politic" in that section must be intended to include a state. Before proceeding with our argument on this question, we desire to call the court's attention to the fact that section 233 of the Judicial Code provides that the United States Supreme Court shall have exclusive jurisdiction of an action against a state, whereas section 17 of the Trading with the Enemy Act provides, in substance, that the District Courts of the United States shall have jurisdiction to make and enter all such rules as to notice and otherwise and to issue such process as may be necessary and proper to enforce the provisions of this act. While a number of courts have had occasion to construe the term "body politic," in connection with particular statutes, it has never been construed in any court in such a manner as to hold that it gives an inferior Federal Court jurisdiction over the state in its sovereign capacity

in an action brought in such inferior court against the state. The phrase "body politic" has a very wide and all-embrasive meaning when used in a general sense, and the courts have construed it to include every imaginable political corporate entity from an institution of learning—*School Board v. Meredith*, 71 So. 209—to the United States of America in the citation in counsel's brief on page 16. Incidentally, we might say that Chief Justice Marshall's definition of the United States as a body politic and corporate was in a general sense, and not for the purpose of construing a statute in which the term "body politic" had been used.

If it were not for other constitutional and statutory provisions, the term is unquestionably broad enough to include the state, but inasmuch as it is a general term which includes all possible bodies politic and corporate within the United States, and would therefore include drainage districts, irrigation districts, towns, cities and numerous other political subdivisions, as to all of which there is no constitutional or statutory inhibitions to prevent jurisdiction of the court attaching while in the case of a state there are such constitutional and statutory prohibitions, the intention of Congress to repeal such provisions by the use of a term of such general and indeterminate significance, and bring a sovereign state within the jurisdiction of the inferior Federal Courts must be plainly apparent. If section 233 of the Judicial

Code, which gives the United States Supreme Court exclusive jurisdiction of an action against the state is repealed by the Trading with the Enemy Act, it is repealed by implication and by virtue of a construction to the effect that a state is, in fact, a body politic. It is submitted that if such a repeal were intended or had actually taken place, that Congress would have used the word "state" and not the loose and vague term "body politic."

(b) Intention to repeal section 233, Judicial Code, must be plainly apparent in view of special dignity accorded a state by Federal Courts.

The first Congress in the Act of September 24, 1789, chapter 20, section 13, 1 Stat. at L., 80, provided as follows:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases it shall have original but not exclusive jurisdiction."

This provision is now incorporated in section 233 of the Judicial Code in the following language:

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction. And it shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of

law can have consistently with the law of nations; and original, but not exclusive, jurisdiction, of all suits brought by ambassadors, or other public ministers, or in which a consul or vice consul is a party.”

This provision for exclusive jurisdiction of the Supreme Court of the United States in actions against the state has remained the supreme law of the land for 134 years.

It has been held under this section that a state, if it sees fit, may submit to the jurisdiction of the inferior courts, and the state, as plaintiff, may therefore select such court as it may see fit, but there has never been a case, so far as we have been able to discover, where any court has held that the state can be sued in its sovereign capacity, without its consent in any court except the United States Supreme Court. The courts of the United States have always been scrupulously careful in their recognition of the respect due the dignity of a sovereign state, and it was deemed incompatible with such dignity to compel a sovereign state to submit unwillingly to the jurisdiction of any court of less solemn power than the Supreme Court of the land.

“That a Circuit Court of the United States has not jurisdiction, under existing statutes, of a suit by the United States against a state, is clear; for by the Revised Statutes it is declared—as was done by the Judiciary Act of 1789—that ‘the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states or aliens, in which latter cases

it shall have original, but not exclusive, jurisdiction.' Rev. Stat. sec. 687; Act of September 24, 1789, c. 20, sec. 13; 1 Stat. 80. *Such exclusive jurisdiction was given to this court, because it best comported with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than in a subordinate judicial tribunal of the nation.* Why then may not this court take original cognizance of the present suit involving a question of boundary between a territory of the United States and a state?" *U. S. v. Texas*, 143 U. S. 621, 36 L. ed. 285. (Italics ours.)

This same thought is also embodied in the case of *Ames v. Kansas*, 111 U. S. 449, 464, 28 L. ed. 482, in the following language:

"It thus appears that the first Congress, in which were many who had been leading and influential members of the convention, and who were familiar with the discussions that preceded the adoption of the Constitution by the states and with the objections urged against it, did not understand that the original jurisdiction vested in the Supreme Court was necessarily exclusive. That jurisdiction included all cases affecting ambassadors, other public ministers and consuls, and those in which a state was a party. The evident purpose was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a state or a diplomatic or commercial representative of a foreign government. So much was due to the rank and dignity of those for whom the provision was made; but to compel a state to resort to this one tribunal for the redress of all its grievances, or to deprive an ambassador, public minister or consul of the privilege of suing in any court he chose having jurisdiction of the parties and the subject matter of his action,

would be, in many cases, to convert what was intended as a favor into a burden.

* * * * *

“With respect to states, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a state was a party, except between a state and its citizens, and except also, between a state and citizens of other states or aliens; in which latter case its jurisdiction should be original but not exclusive. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which jurisdiction might be given in suits between a state and citizens of other states or aliens. No jurisdiction was given in such cases to any other court of the United States, *and the practical effect of the enactment was, therefore, to give the Supreme Court exclusive original jurisdiction in suits against a state begun without its consent*, and to allow the state to sue for itself in any tribunal that could entertain its case. In this way *states, ambassadors and public ministers were protected from the compulsory process of any court other than one suited to their high positions*, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction. No limits were set on their powers of choice in this particular. This, of course, did not prevent a state from allowing itself to be sued in its own courts or elsewhere in any way or to any extent it chose.” (Italics ours.)

The recognition accorded state sovereignty is to be found in many different lines of decisions of the Supreme Court of the United States. One familiar example is the requirement in rate cases that state remedies must be first exhausted before recourse may be had to the Federal Courts, under the rule of comity

and convenience laid down in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, and followed in numerous later cases.

It is evident that a statute relative to the exclusive jurisdiction of the Supreme Court of the United States which has been observed for one hundred and thirty-four years is not to be entirely set aside or disregarded, nor can the intention be imputed to Congress to repeal such a provision in the Trading with the Enemy Act unless the intention clearly appears. As set forth above, the only possible ground to base such a supposition upon is that a state is to be included among the bodies politic referred to in the Trading with the Enemy Act.

(c) Repeals by implication not favored.

Section 17 of the Trading with the Enemy Act reads as follows:

“That the District Courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled ‘An act to codify, revise, and amend the laws relating to the judiciary’.”

The Trading with the Enemy Act is an act complete within itself and contains no direct repeal of any previous legislation, and if there be a repeal of

section 233 of the Judicial Code, it must be by implication.

It is a rule observed, we believe, by all courts that repeals by implication are not favored, and if two acts apparently in conflict may be reconciled, such reconciliation will be effected rather than to hold that one act repeals the other. In the present case reconciliation is very easy. The term "body politic" being of such general significance, can be easily applied to all bodies politic except the state, and by reason of the long standing law upon the subject of jurisdiction over the state, it can be properly concluded that Congress did not intend to confer jurisdiction over the state upon the District Court. We do not dispute the power of Congress to confer such jurisdiction under its war powers, but contend that even under a war act the intention to overthrow a provision of such importance and one so long recognized and observed by our courts, must be plainly apparent and not inferred from general language. The rule relative to repeals by implication is well stated in Lewis' Sutherland on Statutory Construction, Vol. 1, page 247, as follows:

"When some office or function can, by fair construction, be assigned to both acts, and they confer different powers to be exercised for different purposes, both must stand, though they were designed to operate upon the same general subject * * *. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or when in the latter statute some express

notice is taken of the former plainly indicating an intention to repeal it, and where two acts are seemingly repugnant they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication."

The same rule is given in every text book on interpretation of statutes and innumerable cases cited in support thereof. We will not burden this court with citations of such a familiar rule other than to call their attention to the case of *United States v. Barnes*, 222 U. S. 513, 520, 56 L. ed. 291, 293, where the court says:

"Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject, it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, save as the contrary clearly appears. Thus, in *Wood v. United States*, 16 Pet. 342, 363, 10 L. ed. 987, 995, where a question arose as to what effect should be given a general provision of an early customs law in view of a later enactment upon that subject, it was said: 'And it may be added that, in the interpretation of all laws for the collection of revenue, whose provisions are often very complicated and numerous to guard against frauds by importers, it would be a strong ground to assert that the main provisions of any such laws sedulously introduced to meet the case of a palpable fraud should be deemed repealed, merely because in subsequent laws other powers and authorities are given to the customhouse officers, and other modes of proceeding are allowed

to be had by them before the goods have passed from their custody, in order to ascertain whether there has been any fraud attempted upon the government. The more natural, if not the necessary, inference in all such cases is, that the Legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each. There certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designated to abrogate, the former'."

The provisions regarding the jurisdiction and proceedings of the Federal Courts have been for many years embodied in a judicial code, and the foregoing statement of the court is quite pertinent when any contention is made that a provision of the judicial code relative to jurisdiction of the Supreme Court of the United States has been changed by implication in any statute.

In view of the fact that section 233 of the Judicial Code expressly states that the Supreme Court of the United States shall have exclusive jurisdiction in actions against the state, and that the Trading with the Enemy Act only provides that the District Courts shall have jurisdiction of actions instituted by the Alien Property Custodian against persons, including a body politic, and does not state that the District Courts shall have jurisdiction of actions against a state, it is submitted that there has been no repeal by implication, which repeals are not favored in law.

Nor is there such a direct conflict between the two statutes that one must fail if both be given effect.

Section 2, Article III, of the Constitution of the United States reads, in part, as follows:

“In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.
* * *”

It will thus be noted that the Constitution states that where a state is a party, the Supreme Court of the United States shall have original jurisdiction, whereas, section 233 of the Judicial Code, states that in civil actions in which a state is a party, the Supreme Court shall have exclusive jurisdiction. In the earlier cases some claim was made that original jurisdiction as used in the Constitution amounted, in fact, to exclusive jurisdiction, but this contention was finally refuted by the courts in cases in which a state was the plaintiff. Great reliance is placed by counsel for the plaintiff on some of the cases holding to this effect.

The case of *Cohens v. Virginia*, 6 Wheat. 264, is in no way applicable, as that was the first case which held that where the state was a plaintiff, a writ of error would lie to the Supreme Court of the United States from a decision of the highest state tribunal. In so holding the court said:

“The Constitution declares that in cases where a state is a party, the Supreme Court shall have original jurisdiction, but does not say that its appellate jurisdiction shall not be exercised in cases where from their nature appellate jurisdiction is given whether a state be or be not a party. It may be conceded that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there, but where from its nature it cannot originate in that court these words ought not to be so construed as to require it.”

In that case the state was a party plaintiff and the constitutional provision alone was considered which stated that the Supreme Court had original jurisdiction, but that in a proper case where the state was a plaintiff it might also exercise appellate jurisdiction. In the case of *Bors v. Preston*, 111 U. S. 252, it appeared that one Preston sued Bors, who was a consul for the Kingdoms of Norway and Sweden, in the Circuit Court of the United States. The question was raised as to the jurisdiction of this court. The constitutional provision above quoted states that the Supreme Court of the United States shall have original jurisdiction in actions in which a consul is a party. Section 233 of the Judicial Code also provides that the United States Supreme Court shall have original, but not exclusive, jurisdiction of actions in which a consul was a party. It was there held that although the Constitution vested the Supreme Court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction in those cases upon

such inferior courts as might by law be established. That case is obviously not in point by reason of the fact that Congress has never enacted any legislation stating that the Supreme Court of the United States shall have exclusive jurisdiction in actions where a consul is a party, as they have done in section 233 of the Judicial Code, in cases where a state is a party.

Neither is the case of *Ames v. Kansas*, 111 U. S. 449, in point, as that also was an action in which a state was not a defendant, but a party plaintiff. In holding that there was a vital distinction in cases where the state was a defendant, the court said:

“No jurisdiction was given in such cases to any other court of the United States, and the practical effect of the enactment was therefore to give the Supreme Court exclusive original jurisdiction in suits against the state begun without its consent, and to allow the state to sue for itself in any tribunal that could entertain its case.”

III.

THIS ACTION IS NOT ANCILLARY TO THE CASE OF
MILLER V. CLIFFORD, 288 FED. 537.

In support of a contrary conclusion, counsel for plaintiff cites one case, *Gunter v. Atlantic Coast Line Railway Co.*, 200 U. S. 273, 50 L. ed. 478. The proper rule governing this proceeding, however, is the following:

“Ancillary nature of proceeding. Jurisdiction will not be entertained of suits or proceedings which are not properly ancillary to the original one, unless they are otherwise within the original jurisdiction of

the court, but in order that a Federal Court may have jurisdiction of a suit or other proceeding as dependent, a dependent cause of action is indispensable. * * * After the determination of the original cause, jurisdiction will not be extended to other questions and issues raised by a supplemental bill filed after such determination." 25 C. J. 698. *Pell v. McCabe*, 250 U. S. 573, 63 L. ed. 1147; *Stillman v. Combe*, 197 U. S. 436, 49 L. ed. 822; *H. C. Cook Co. v. Beecher*, 217 U. S. 497, 54 L. ed. 855; *Raphael v. Trask*, 194 U. S. 272, 48 L. ed. 973; *Christmas v. Russell's Executors*, 14 Wall. 69, 20 L. ed. 762; *G. & C. Merriam Co. v. Saalfeld*, 241 U. S. 22, 60 L. ed. 868; *Supreme Tribe of Ben Hur v. Cobble*, 264 Fed. 247; *Montgomery v. McDermott*, 103 Fed. 801; *Woerheide v. H. W. Johns-Manville Co.*, 199 Fed. 535; *Central Trust Co. v. Chicago R. I. & P. Railway Co.*, 224 Fed. 706; *Anglo-Florida Phosphate Co. v. McKibbin*, 65 Fed. 529; *Winter v. Swinburne*, 8 Fed. 49.

We believe that this case falls clearly within the foregoing rule and citations and that this is not an action ancillary to the former case of *Clifford v. Miller*, *supra*. A comparison of the subject matter involved in that suit, the relief sought and the defendant therein, with the subject matter, relief and defendant in this action will show clearly that the two proceedings are entirely separate and distinct and that this action is an original action.

The case of *Miller v. Clifford*, as it was entitled in the District Court was a suit in equity for the sole purpose of obtaining possession of certain warrants and compelling the issuance of certain vouchers and to obtain possession of such vouchers when issued. It was directed against the Superintendent of the

Department of Labor and Industries of the State of Washington and the Supervisor of Industrial Insurance of the said department and state. As expressly indicated in the opinion in the case of *Clifford v. Miller, supra*, no relief was sought against the state and no attempt made to administer funds in the public treasury. After the final decree was entered in that suit the vouchers involved therein were issued by the Department of Labor and Industries and such vouchers and warrants were delivered to the Alien Property Custodian. Upon the delivery of these documents full relief sought by that suit had been obtained and the matter was finally determined. No further action was required thereunder by either the Alien Property Custodian or the defendant in that suit. That suit did not involve the validity of such vouchers or warrants, but the sole subject matter of the litigation was the possession of these papers.

The present proceeding is an action at law in the form of mandamus to obtain funds from the public treasury of the State of Washington. The defendant in this action is the State Treasurer of the State of Washington. He was not a party to the former suit and had no opportunity to contest the legality and validity of the warrants involved in that suit. We think that after an examination of the foregoing cases and a comparison of the equity suit of *Clifford v. Miller* and this law action of *Miller v. Babcock*, the conclusion cannot be escaped that the present action

is not ancillary to the former, but must be considered an independent original proceeding in the District Court.

We do not think that anything can be found in the case of *Gunter v. Atlantic Coast Line*, *supra*, which is contrary to the rule above set forth, while there is much in that case, we think, adverse to counsel's contention. The *Gunter* case was the outgrowth of the earlier case of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, decided by the Supreme Court of the United States in 1873. In the *Pegues* case a permanent injunction was granted to restrain the county treasurers of certain counties in South Carolina from assessing and collecting taxes from certain railway companies. An examination of that case will show that no question of jurisdiction was raised, nor any question that the suit was against the state of South Carolina. The injunction thus granted was observed and no taxes were attempted to be collected from the railway companies for twenty-five years. Then the State of South Carolina, by legislative action, attempted to authorize such taxation and the county officials endeavored to collect from the Atlantic Coast Line Railway Company, the successor in interest of the companies involved in the *Pegues* case, and the railway company took steps to prevent the assessment and collection of such taxes. Although this proceeding was more than twenty-five years after the *Pegues* case, we call attention to the follow-

ing statement in the *Gunter* case, 200 U. S., page 281, 50 L. ed. 483:

“The petition which initiated the proceeding was filed as ancillary to the original *Pegues* case, and was entitled and numbered as that cause.”

Counsel in this case has not followed such practice, but has given this action a new title and it has been docketed under a new number. Furthermore, counsel has not in this action set forth the decree in the former action, but has only alleged in his petition certain erroneous conclusions of law as to the effect of the decree in the former suit.

Although in the *Pegues* case the jurisdictional question was not raised, the Supreme Court in the *Gunter* case by an elaborate train of reasoning shows that in the *Pegues* case the State of South Carolina was the real party in interest and waived any objections that might have been raised to the jurisdiction, and jurisdiction having attached in that original proceeding would be retained in the ancillary proceeding, although that also was against the state as the real party in interest. The court says, on page 292, 200 U. S., and page 487, 50 L. ed.:

“None of the prohibitions, therefore, of the amendment or of the statute relate to the power of a Federal court to administer relief in causes where jurisdiction as to a state and its officers has been acquired as a result of the voluntary action of the state in submitting its rights to judicial determination. To confound the two classes of cases is but to overlook the distinction which exists between the power of a court to deal with a subject over which it

has jurisdiction, and its want of authority to entertain a controversy as to which jurisdiction is not possessed. From this it follows that, as in the *Pegues* case, the court had acquired jurisdiction, with the assent of the State of South Carolina, to determine as to it the controversy presented in that case, the right of the court to administer relief—to make its decree effective—cannot be measured by constitutional or statutory provisions relating to original proceedings where jurisdiction over the controversy did not obtain.” (Italics ours.)

In the case of *Clifford v. Miller*, the state never consented to the jurisdiction, but was overruled, the Circuit Court holding that the state was not a party in that suit. The state does not consent to jurisdiction in this case, and for the reasons indicated, holds that this is an original action and not an ancillary proceeding and the situation is therefore entirely different from the situation in the *Gunter* case.

As stated above, the State Treasurer was not a party to the former suit, and therefore had no opportunity to contest the validity of the warrants involved in this action. The State Treasurer may lawfully question the legality of the warrants. *State ex rel. Publishing Co. v. Lindsley*, 3 Wash. 125; *Carlile v. Hurd*, 3 Colo. App. 11, 31 Pac. 952; *Commercial & Farmers Bank v. Worth*, 23 S. E. 160; *Shattuck v. Kincaid*, 31 Oregon 379, 49 Pac. 758; *Gibson v. Kay*, 68 Oregon 589, 137 Pac. 864.

State warrants are not negotiable in the sense of excluding inquiry into the legality of their issuance

or the excluding of defenses thereto. *Bardsley v. Sternberg*, 17 Wash. 243, 49 Pac. 499; *West Philadelphia Title & Trust Co. v. Olympia*, 19 Wash. 159, 52 Pac. 1015; *State ex rel. Ackerman v. Meath*, 87 Wash. 659, 152 Pac. 536.

As stated in the case of *Miller v. Clifford*, *supra*:

“But as already stated, neither the state nor its funds are affected by the decree in the remotest way, and no attempt is made to control the judgment or discretion of state officers.”

The decree in that case simply ordered the defendants to turn over to the Alien Property Custodian certain warrants in his possession and to issue a voucher for other warrants. That decree was completely complied with, which brought about a final determination of the action in that case, so that the present action must be and is an independent one. Furthermore, the parties to the two actions are not the same, as in the case of *Miller v. Clifford*, the circuit court of appeals held that the state was not a party defendant but that the officers were defendants and were wrongfully withholding possession of property in their possession to which the plaintiff was entitled. The State of Washington, in the present action, is the real defendant, and the State Treasurer the nominal defendant, so that even the parties to the action are not the same. Furthermore, in the case of *Gunter v. Atlantic Coast Line Railway Co.*, *supra*, the real issue was not whether the second action was ancillary to the first, but whether the in-

junction issued in the first action was *res adjudicata* as to the issues involved in the second action.

IV.

The remaining portion of this brief will be directed to answering other arguments advanced by counsel for plaintiff in his brief.

We do not fully accept plaintiff's statement as to what our demurrer admitted.

"A demurrer admits allegations only of fact. It does not admit conclusions of the pleader, except when they are supported by and necessarily result from the facts stated in the pleading. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader as to the effect of the facts, nor allegations as to what will happen in the future, nor arguments." Standard Encyclopedia of Procedure, Vol. 6, page 940.

Hester v. Thompson, 35 Wash. 119, 76 Pac. 734;

McMartin v. Stevens, 37 Wash. 616, 79 Pac. 1099.

In the *Hester* case, *supra*, the plaintiff alleged in his petition for the writ of mandamus that the respondents had acted capriciously and arbitrarily in denying a permit. The court had granted a motion to quash the writ and it was contended that the demurrer admitted the truth of the allegations. The demurrer was sustained by the Supreme Court, the court saying that a demurrer admits facts alleged, but not the conclusions drawn therefrom. In the *Mc-*

Martin case, *supra*, the court held that an allegation in a complaint that the good will of the business was the chief consideration in a sale was a mere conclusion of law in view of the expressed terms of the contract, and that such conclusion was not admitted by the demurrer.

Thus, it will be noted that on page 8 of plaintiff's brief in paragraph 4 the statement is made that the warrants in question were "*unlawfully withheld.*" This is purely a conclusion of the plaintiff, as the question has never been decided by a judicial tribunal that they were unlawfully withheld. It is further stated in the same paragraph that relator "is entitled to all of the said warrants *and funds represented thereby* under the Trading with the Enemy Act, *and was awarded them* by the district court and the court of appeals. This statement, so far as it relates to the funds and the awarding of such funds, is a conclusion of the plaintiff. The decree in the case of *Miller v. Clifford*, entered by the district court in pursuance of the decision of this court in the case of *Clifford v. Miller*, 288 Fed. 537, is not a part of the plaintiff's petition, and therefore not before the court in this proceeding. It is proper to state, however, that the decree simply awarded to plaintiff and relator in this case the custody of the warrants and vouchers involved in that case and made no reference to the state funds. As stated by Judge Rudkin in the case of *Clifford v. Miller, supra*:

“No relief whatever is sought against the state and no attempt is made to control the discretion of the state executive officers or to administer funds in the public treasury * * * but as already stated, neither the state nor its funds are affected by the decree in the remotest way and no attempt is made to control the judgment or discretion of the state officer.”

In view of the foregoing decision and the decree affirmed by that decision, plaintiff's statement in his petition relative to the state funds and the awarding thereof is wholly a conclusion by the plaintiff and is not admitted by the demurrer.

II.

Plaintiff in his brief maintains *the action of mandamus is recognized by both state and Federal courts as the proper remedy to compel a municipal or state officer to pay a warrant duly issued or to perform any other ministerial act.*

This statement is correct as far as it goes, but it does not apply to the situation in this case. Neither the state nor federal courts attempt by mandamus to control the discretion of state officers. The cases cited by plaintiff are all carefully selected cases involving no power of discretion on the part of the officer, or acts by officers under unconstitutional laws. Thus, in the case of the *Board of Liquidation, et al., v. McComb*, 92 U. S. 534, 23 L. ed. 623, cited by counsel, the court states:

“The objections to proceeding against state officers by mandamus or injunction are: First, that it

is in effect proceeding against the state itself; and, second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers in matters belonging to the proper jurisdiction of the latter.”

Also, in the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, cited by counsel, the court, in considering what is a suit against the state, divided such suits into two classes as follows:

“The first class is where the suit is brought against the officers of the State, as representing the State’s action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. *Re Ayers*, 123 U. S. 443 (31:216); *Louisiana v. Jumel*, 107 U. S. 711 (27:448); *Antoni v. Greenhow*, 107 U. S. 769 (27:468); *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446 (27:992); *Hagood v. Southern*, 117 U. S. 52 (29:805).

“The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute commit acts of wrong and injury to the rights of property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain legal duty, purely ministerial, is not within the meaning of the Eleventh Amendment an action against the State.

Osborn v. Bank of United States, 22 U. S. 9 Wheat. 738 (6:204); *Davis v. Gray*, 83 U. S. 16 Wall. 203 (21:447); *Tomlinson v. Branch*, 82 U. S. 15 Wall. 460 (21:189); *Litchfield v. Webster County*, 101 U. S. 773 (25:925); *Allen v. Baltimore & O. R. Co.*, 114 U. S. 311 (29:200); *Louisiana Board of Liquidation v. McComb*, 92 U. S. 531 (23:623); *Poindexter v. Greenhow*, 114 U. S. 270 (29:185)."

In the first class the court would not issue a writ of mandamus, while in the second class of cases it might feel justified in doing so. All of the federal cases cited by counsel for plaintiff are cases which fall within the second class as thus defined, whereas it is our contention, as will be more fully set forth later, that this action is one within the first class, and therefore an action against the state in which the federal courts will not issue a writ of mandamus to attempt to control the discretion of executive officers of the state.

Counsel cites a great many statutes and cases showing under what conditions federal courts have jurisdiction. These, of course, are controlling in all cases where a state is not a party, but have no application to a case of this character where a state is a party by virtue of section 233 of the Judicial Code. We have no quarrel with counsel's argument that the Trading with the Enemy Act was a war measure and has been uniformly upheld by the federal courts.

The case of *In re Miller*, 281 Fed. 773, has no application here, as in that case it was simply held that after a demand had been made by the Alien

Property Custodian for property, that the district court had jurisdiction to enforce such a demand. In the first place, a state was not a party to that action, and in the second place, the exact procedure authorized in the *Miller* case has been carried out herein, as the Alien Property Custodian has made a demand for these warrants, which was refused, and the district court enforced such a demand by ordering the Department of Labor and Industries of the State of Washington to turn over the warrants to the Alien Property Custodian, which has been done.

In the case of *Central Union Trust Co. v. Garvan*, 254 U. S. 554, 65 L. Ed. 403, and kindred cases, the Supreme Court of the United States has held that in a possessory action for the purpose of seizing certain property, that the defendant may not raise the question that he does not owe an alien, and that the Alien Property Custodian in a possessory action may seize it for the purpose of quickly reducing it to possession, and that the issue of whether or not the person holding the property owed an alien might be litigated in a subsequent action by putting in a claim to the Alien Property Custodian in conformity with the provisions of the Trading with the Enemy Act. Such procedure has already taken place in this case, inasmuch as the Alien Property Custodian now has possession of these warrants. However, in the *Central Union Trust Company* case, *supra*, the court said:

“The present procedure gives nothing but the preliminary custody, such as would have been gained by seizure. It attaches the property to make sure that it is forthcoming if finally condemned, and does no more.”

In view of this language, it would appear that the title of the Alien Property Custodian was not such as would give him the right to demand that a state officer pay such warrants until the question of whether or not the state actually owed this money to the aliens was litigated in conformity with the provisions of the Trading with the Enemy Act. If, for instance, the alien widow died, or the condition of dependency changed and in fact the state no longer owed the alien for this reason, certainly the state treasurer, upon being advised of these facts, has power to exercise discretion in paying the warrants, and it is submitted that the jurisdiction of the District Court of the United States, at least where it rests not upon diversity of citizenship but upon the fact that the controversy arises under the constitution and laws of the United States, does not extend as far as that of the state court in compelling state officers to pay moneys out of the state funds where they have discretion in the matter. Furthermore, this is an action instituted against the State Treasurer to pay moneys out of state funds by cashing warrants heretofore delivered to the Alien Property Custodian. No demand was made on the State Treas-

urer for the payment of these warrants until long subsequent to the actual declaration of peace, and such demand must be made prior to that time or it is ineffectual. *Miller v. Rouse*, 276 Fed. 715.

Some contention is also made by counsel for plaintiff that the Eleventh Amendment to the Constitution of the United States is not applicable. The Eleventh Amendment reads as follows:

“The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”

We have never made any contention that the Eleventh Amendment was applicable, as we believed that this was an action instituted by the United States of America, which would render the Eleventh Amendment inapplicable. If, however, this is an action instituted by the United States of America, certainly it is an action against the state. If it is not an action against the state, and counsel takes the position that it is not but still takes the position that it is an action by the United States of America, certainly he is in an inconsistent position, for if it is not an action by the United States of America, the Eleventh Amendment is applicable and the district courts have no jurisdiction whatever.

In the concluding paragraph of plaintiff's brief, it is requested that in case the judgment of the dis-

trict court is overruled, this court should require the district court to issue a peremptory writ for the relief prayed for. When the petition for a writ of mandamus was filed, a demurrer was interposed challenging jurisdiction of the district court. In case the demurrer was overruled, the state proposed to file an answer showing that the state did not owe a large portion of the money represented by the warrants now in the possession of the Alien Property Custodian. In view of this fact and Rule 15 and of the fact that the only question decided by the district court and the only question involved in this appeal is one of jurisdiction, it is submitted that in the event the judgment of the district court is overruled, it should be ordered to overrule the demurrer and allow the defendant to answer the case on the merits.

The concluding portion of plaintiff's brief is taken up with an unwarranted attack upon the motives of the state officers in refusing to pay these warrants, which we deem so undignified as to be not worthy of an answer further than to say that the state officers at least have absolutely no interest in the outcome of this litigation and take the position squarely that they are entitled to have this matter litigated in the court which Congress, by virtue of section 233 of the Judicial Code, has said that we are entitled to have it litigated.

It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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